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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

QUENTIN T. WILES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court Of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit Court of Appeals erred when, in conflict with the decisions of four other Circuits, it upheld a conviction under a single securities fraud charge which joined several statutorily distinct offenses based on numerous distinct securities sales and alleged false statements made in different documents at different times over a one year period, even though the jury was not instructed that they must unanimously agree on any particular offense.

2. Whether a conviction for wire fraud under 18 U.S.C. § 1343 can stand, in light of this Court's subsequent opinion in *United States v. Gaudin,* 115 S.Ct. 2310 (1995), when the jury was not instructed that they had to make the essential materiality determination and when the instructions informed the jury that the materiality of the statements at issue would be resolved *by the court* on a related count.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Quentin T. Wiles respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to the petition and is reported at 102 F.3d 1043 (10th Cir. 1996). The order of the United States Court of Appeals denying relief on the petition for rehearing and the suggestion for rehearing *en banc* appears at Appendix B and is reported at 106 F.3d 1516 (10th Cir. 1997).

JURISDICTION

The United States Court of Appeals entered its judgment on December 10, 1996. Appendix ("App.") at A-1. A timely petition for rehearing was granted in part and denied in part by the Court of Appeals, and relief was denied on February 14, 1997. App. at B-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provisions of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78ff(a), and the regulation promulgated thereunder, 17 C.F.R. § 240.10b-5, are reprinted in its entirety in Appendix E to this petition. The full text of 18 U.S.C. § 1343 is reprinted in Appendix E to this petition.

STATEMENT OF THE CASE

A. Background

Petitioner Quentin T. Wiles is the former chairman of the board and chief executive officer of MiniScribe, a formerly publicly-traded, Colorado-based manufacturer of computer disk drives. Mr. Wiles became chairman of MiniScribe's board of directors in 1985. The company experienced phenomenal growth under Mr. Wiles' leadership, more than tripling its annual sales within two years.

From 1986 to early 1987, some of MiniScribe's officers became aware that the amount of inventory reflected in MiniScribe's books was overstated. The government's two main witnesses, Owen Taranta and Kenneth Huff, decided to hide the shortfall from MiniScribe's auditors. Without Mr. Wiles' knowledge, they falsified MiniScribe's financial records.

Later in 1987, based on a visit to the company's division in the Far East, Mr. Wiles himself became concerned that the company did not have adequate control of its inventory. In August 1987, Mr. Wiles instructed Owen Taranta to analyze the company's financial controls and to propose necessary changes. Among other things, Taranta tried to study MiniScribe's inventory.

At a meeting in October 1987, Taranta reported that he had found an inventory shortfall of approximately $15 million. Mr. Wiles expressed his disbelief, shared by others in attendance, that a problem of such magnitude could exist without being reflected and detected in various operational reports. Mr. Wiles instructed Taranta to reexamine the inventory and perform a cash flow analysis in order to confirm the existence of an inventory shortfall. Contrary to the understanding of everyone else in the room, including all the other government witnesses, Taranta claimed that he understood Mr. Wiles' instruction as requiring a massive

financial fraud to hide the problem from MiniScribe's auditors.

In the following months, Taranta, and others, engaged in an elaborate scheme to cover up the inventory shortfall. They shipped bricks packaged as computer disk drives, recording them as inventory-in-transit with a value of $4 million. They created records of non-existent shipments of computer parts, and counted these non-existent shipments in inventory. Through this and other means, Taranta overstated MiniScribe's inventory (and made offsetting adjustments to MiniScribe's reserves) by varying amounts over the next several quarters. As a result, according to the government, several of MiniScribe's financial statements were falsified in various ways from 1987 through 1989.

B. Proceedings Below

A grand jury in the District of Colorado indicted Mr. Wiles in March 1993. Patrick J. Schleibaum, who had been MiniScribe's chief financial officer in early 1987, was separately indicted. The indictment against Mr. Wiles alleged that petitioner participated in a scheme to deceive shareholders, the Securities and Exchange Commission and MiniScribe's bank, and that Mr. Wiles made numerous false statements at various points, beginning in August, 1987, when he first instructed Taranta to review MiniScribe's inventory.

Mr. Wiles denied any knowledge of the inventory shortfall or the course of action taken by Taranta and others to cover up the shortfall. Accordingly, the trial focused on the extent of Mr. Wile's knowledge at various times during 1987 and 1988: as the prosecutor put it, the question was "what did Wiles know and when did he know it?"

Because the three counts of the indictment raised distinct constitutional issues, we discuss the proceedings related to each count below.

1. Securities Fraud — Count 2.

Count 2 of the indictments charged Mr. Wiles with securities fraud under 15 U.S.C. §§ 78j(b), 78ff(a) and 17 C.F.R. § 240.10b-5. Because the provisions at issue make it a crime to engage in a scheme to defraud *and*, independent of any scheme, make it illegal to make false statements relating to securities, the government included in Count 2 at least eight distinct offenses:

> (1) The submission of a false annual report (10-K) to the SEC on March 30, 1988;
>
> (2) The submission of a false annual report to the shareholders "in the spring of 1988";
>
> (3) The submission of a false quarterly report (10-Q) on May 10, 1988;
>
> (4) The issuance of a false press release on Mini-Scribe's inventory and earnings on July 13, 1988;
>
> (5) The submission of a false quarterly report (10-Q) on August 11, 1988;
>
> (6) The submission of a false quarterly report (10-Q) on November 15, 1988.
>
> (7-8) "Insider trading" on two separate occasions in April and May 1988, when Mr. Wiles sold small portions of his MiniScribe holdings

App. C1-9.

Prior to trial, Mr. Wiles moved to dismiss Count 2 on grounds that it was "duplicitous," *i.e.*, that it contains at least eight separate offenses. Count 2 joins eight distinct offenses under Rule 10b-5 — two crimes of insider trading and six crimes of making false and misleading statements — in a single count. The district court denied the motion, noting that the government "would have to make an elec-

tion" after the close of evidence. In fact, the government expressly declined to "make an election" or otherwise narrow Count 2 to any one offense, or even any one type of offense. The result was, as the defense predicted, inevitable jury confusion.

Mr. Wiles renewed his objection to Count 2 at the close of the evidence. The district court asked the government: "Are you going to argue the insider trading? Are you going to argue the false annual report? What are you arguing?" The government announced that it was "arguing both."

The defense had predicted inevitable jury confusion, and after several hours of deliberation, the jury sent a note to the court in which it asked:

> Can you clarify the portion of your instruction to jury regarding the requirement that we agree unanimously on one of many individual charges in each count of the indictment?

App. D3.

The Court's response failed to require unanimity on any particular offense. The court informed the jury that they all had to agree that Mr. Wiles (1) engaged in a "scheme to conceal an inventory shortage," or (2) knowingly "made untrue statements of material facts" or (3) engaged in "insider trading." App. D3-4. Under the court's instructions, therefore, the jury was free to convict Mr. Wiles of making false statements, without agreeing on when he made false statements, what false statements he made, and upon which false statement a shareholder relied in the purchase or sale of securities. They were free to convict Mr. Wiles for "insider trading" without agreeing on which of his securities trades were based on particular inside information.[1]

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[1] Indeed, the Honorable Richard P. Matsch, the well-respected presiding judge of the district court, himself noted that it is impossible to

On appeal to the Court of Appeals for the Tenth Circuit, Mr. Wiles argued that, under the plain language of the statute, Count 2 contained multiple distinct offenses. Under the court's instructions, permitting a verdict on Count 2 deprived Mr. Wiles of his constitutional right to a unanimous jury verdict that he was guilty of a criminal offense. The Court of Appeals rejected this argument, on the ground that unanimity as to distinct offenses is not required so long as all of the offenses are part of a single scheme (regardless of whether the jury found any such scheme). *Wiles* 102 F.3d at 1062-1063; App. A34-35. This ruling ignored the fact that a "scheme" was only one of three "means or methods" by which Mr. Wiles was alleged to have violated Rule 10b-5, and that the jury was instructed on all three, including two "means or methods" which did not require them to find a "scheme." This result is contrary to the decisions of other courts of appeals to consider the issue, and is impossible to square with any of this Court's plurality, concurring, or dissenting opinions on the unanimity requirement in *Schad v. Arizona*, 501 U.S. 624 (1991).

2. False Statement to the SEC — Count 1.

Count 1 of the indictment charged Mr. Wiles with filing a knowingly false annual 10-K financial report with the SEC, in violation of 18 U.S.C. § 1001. App. C8. Although Mr. Wiles hotly disputed the materiality of the statements in

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know what the jury decided with respect to Count 2. During sentencing, Judge Matsch was initially reluctant to use the conviction under Count 2 to determine the amount of any loss for sentencing purposes, because it was not clear what the jury had found by their guilty verdict in Count 2. Judge Matsch stated, "I want to focus on Count 1 in the case, because I think that's the *solid* count . . . And in many respects, these other two counts are add-ons and, you know, *we have even the problem of the ambiguity about the jury verdict on Count 2 because Count 2 could be focused on insider trading. It could also be focused on the financial statements again.*" (emphasis added).

question to the SEC, repeatedly moving for dismissal or judgment on this ground, in accordance with then-prevailing law, the district court instructed the jury that the court would determine the materiality of the statements at issue in the 10-K report.

This Court subsequently decided *United States v. Gaudin*, 115 S. Ct. 2310 (1995), holding that a defendant has a right under the Fifth and Sixth Amendments to have a jury determine guilt beyond a reasonable doubt on every element of the offense, including materiality when this is an element of the offense. The Court of Appeals consolidated Mr. Wiles' appeal with an appeal by Patrick Schleibaum and an unrelated case in order to consider the applicability of *Gaudin* to numerous pending cases. The *en banc* court reversed Mr. Wiles' conviction under § 1001. *Wiles*, 102 F.3d at 1053-1061; App. A16-33. The government has filed a petition for *certiorari* in *United States v. Schleibaum*, No. 96-1430 (but not in *Wiles*), suggesting that the Court address or remand *Schleibaum* in light of this Court's anticipated decision in *Johnson v. United States*, No. 96-203.[2]

3. Wire Fraud — Count 3.

Count 3 of the indictment charged Mr. Wiles with wire fraud under 18 U.S.C. § 1343. App. C9-10. Count 3 alleged that Mr. Wiles defrauded Standard Chartered Bank by

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[2]Schleibaum has filed a cross-petition for *certiorari* on the ground that Count 2, which was virtually identical in both the *Wiles* and *Schleibaum* indictments, was duplicitous because it contained more than one offense. If the Court were to accept review of Schleibaum's cross-petition on that issue, review would also be appropriate in this case for the very same reasons. Mr. Wiles here seeks *certiorari* on the additional grounds that, in addition to Count 2 being duplicitous, the jury was permitted to return a non-unanimous verdict.

causing MiniScribe's 1987 10-K report (the same report at issue in Count 1) to be delivered to the Bank.

The instructions for Count 3 failed to require a jury determination of the essential materiality requirement for wire fraud. And the instructions as a whole strongly suggested to the jury that they were *not* required to make any such determination — that the issue would be decided by the trial court. In its instructions regarding Count 1 concerning the same report, the district court told the jury that the statements had to be material, but that this materiality determination would be made by the court. App. D5. With respect to Count 2 (concerning numerous statements to shareholders), the court instructed the jury that the various statements had to be material, and that the jury must make this materiality determination. App. D5. With respect to Count 3, which, like Count 1, concerned MiniScribe's 1987 10-K, the court told the jury that the statements had to be material, but did not tell them that they had to decide this issue. App. D6 Indeed, the district court specifically informed the jury that the false statements in Count 3 were the very same false statements at issue in Count 1 — as to which the court had already informed the jury that the court would determine materiality. App. D7. Thus, not only was the jury never required to make the essential materiality determination, the instructions strongly suggested that the issue would be decided not by the jury, but by the court.

On appeal, Mr. Wiles argued that the failure to require a jury determination of materiality on Count 3 violated *Gaudin*. Although the only circuit to address Gaudin error in such circumstances has reversed the conviction, the Tenth Circuit affirmed without discussion or defense of the instructions on this issue. *Wiles*, 102 F.3d at 1059 n. 11 (App. A 29-30); *Wiles*, 106 F.3d at 1517 (App. B3).

REASONS FOR GRANTING THE PETITION

A. The Unanimity Question.

This Court last accepted an important unanimity case in 1991, in *Schad v. Arizona*, 501 U.S. 624 (1991), but no approach to the issue commanded a majority. The absence of agreement on any standard or approach has left substantial disagreement in the circuit courts, which continue to follow their conflicting pre-*Schad* decisions, engendering increasing diversity and confusion as to the limits and standards of the unanimity requirement in cases where a single count in a federal indictment alleges multiple separate offenses or multiple factual or legal theories.

This case presents the Court with an opportunity to set the constitutional minimum: Where, as here, a single count alleges multiple illegal acts each of which is a separate offense under the statute at issue, a guilty verdict requires the jury to agree unanimously on the same offense. In the words of Justice Scalia's concurrence in *Schad*, the jury cannot be permitted to convict a defendant of assault without unanimous agreement as to whether "the defendant assaulted either X on Tuesday or Y on Wednesday." *Schad* at 651 (Scalia, J., concurring). The jury here was permitted to convict Mr. Wiles for making any one of a number of false statements on various occasions — each of which was a separate offense under the securities laws — without agreeing whether Mr. Wiles made statement X in March or statement Y in November and whether a shareholder purchased or sold securities as a result of said statements. The Tenth Circuit view below, that this sort of non-unanimity is permissible so long as all the offenses are part of a single course of conduct, renders the unanimity requirement meaningless in most prosecutions. This is contrary to the implicit views reflected in the plurality, concurring and dissenting opinions in *Schad*, and is contrary to the approach

in most of the circuits to address the issue. *See e.g., United States v. Duncan*, 850 F.2d 1104, 1111 (6th Cir. 1988), *cert. denied*, 493 U.S. 1025 (1990); *United States v. Echeverry*, 698 F.2d 375, *modified*, 719 F.2d 974, 975 (9th Cir. 1983); *United States v. Holley*, 942 F.2d 916, 927 (5th Cir. 1991), *cert. denied*, 510 U.S. 821 (1993); *United States v. Beros*, 833 F.2d 455, 461 (3d Cir. 1987).

Failure to set a uniform standard on this critical constitutional right will result in constitutional infirmity and confusion in a large number of federal indictments, trials, and jury verdicts for years to come.

B. The *Gaudin* Question

As this Court is doubtless aware, the Tenth Circuit's decision refusing to reverse Count 3, in spite of the absence of a jury determination of materiality, is only one of a great many conflicting circuit court cases attempting to apply this Court's decision in *United States v. Gaudin*. In virtually identical circumstances, the Ninth Circuit has held that *Gaudin* error requires reversal. *United States v. Nash*, 64 F.3d 504 (9th Cir. 1995), *modified*, 76 F.3d 282 (9th Cir. 1996).

This Court has taken review in *Johnson v. United States*, No. 96-203, in an effort to set a consistent standard on this issue. Wiles respectfully submits that this Court should grant *certiorari* here for the same reasons as in *Johnson*, and that the Court should resolve the split between the Tenth and Ninth Circuit approaches to Count 3 (or remand for consideration by the Tenth Circuit in the first instance) in light of this Court's decision in *Johnson*.

I. The Tenth Circuit's Decision on the Unanimity Issue Is Part of an Enduring and Pervasive Conflict in the Circuits About the Core Meaning and Requirements of the Constitutional Unanimity Guarantee.

The wording of the indictment and of the statutory provisions in question leaves no doubt that Count 2 charged Mr. Wiles with numerous separate offenses. Count 2 charged Mr. Wiles with making allegedly false and misleading statements on six disparate occasions and of engaging in insider trading on two separate occasions.

Although a single count may include various means of committing the same offense, separate offenses may not be joined in one count. *Schad* 501 U.S. at 633 (plurality opinion) (citing *United States v. UCO Oil Co.*, 546 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977)); Fed. Rule Crim. Proc. 8(a); *Holley*, 942 F.2d at 927; *United States v. Starks*, 515 F.2d 112, 117-118 n.9 (3d Cir. 1975) (because the Hobbs Act "denounces a number of acts as *separate offenses*" single count alleging several such acts is improper) (emphasis in the original).

"[U]nanimity is one of the indispensable features of a federal jury trial." *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J. concurring) (emphasis and citations omitted). One of the principal reasons for requiring charging of separate offenses in separate counts is the danger that the jury may find a defendant guilty without unanimously agreeing on the commission of a particular offense, in violation of the defendant's constitutional right to a unanimous verdict. *See United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *Starks*, 515 F.2d at 116. Accordingly, where multiple offenses are charged in a single count, the Sixth Amendment requires that the jury must be instructed to unanimously agree at least on a particular offense. *See Holley*, 942 F.2d at 927; *United States v. Edmonds*, 80 F.3d 810, 819 (3d Cir.), *cert.*

denied, 117 S.Ct. 295 (1996). The jury received no such instructions here.

A. Count 2 Joined Eight Separate Offenses Under Section 10(b) of the Securities and Exchange Act and Rule 10b-5.

Under section 10(b) of the Securities and Exchange Act, the criminal offense is comprised of the use or employment, in connection with a purchase or sale of a security, of " 'any manipulative or deceptive device or contrivance,' in contravention of the rules" promulgated by the SEC. Each use of such a "device or contrivance" is a separate offense. *See United States v. Langford*, 946 F.2d 798, 803 (11th Cir.), ("device or contrivance" is the "allowable unit of prosecution" under section 10(b)) *cert. denied*, 503 U.S. 960 (1991).

Count 2 of the indictment tracked, virtually verbatim, the SEC's Rule 10b-5, which defines what constitutes a manipulative or deceptive device or contrivance. The Rule defines three distinct offenses: (a) to employ a device, scheme or artifice to defraud; (b) to knowingly make any untrue statement or omission of material fact; and (c) to engage in any act, practice or course of business that would operate as a fraud or deceit. The indictment in this case expressly charged Mr. Wiles with (a) employing a device, scheme or artifice to defraud, *and* (b) with knowingly making untrue statements, and (c) engaging in acts, practices or courses of conduct that operated as a fraud or deceit. App. C 1-9. The indictment thus charged Mr. Wiles with a scheme to defraud shareholders, *and* with making six untrue statements *and* with engaging in insider trading on two occasions.

Although the government argued that all this conduct was part of a single scheme, the plain language of the statute makes this irrelevant to the question whether, for example, each false report constituted a separate offense. The express

terms of the rule make clear that each false statement made in connection with the sale of securities violates the law, even in the absence of any scheme to defraud. The various clauses are disjunctive, and a defendant can violate clause (b), which proscribes the making of false statements, without violating clause (a), which proscribes schemes to defraud.[3] *See Peil v. Speiser*, 806 F.2d 1154, 1162 (3d Cir. 1986) (clause (b) of Rule 10b-5, prohibiting false or misleading statements, "is indisputably satisfied by a single fraudulent action" without proof of a "*scheme* to defraud"); *Langford*, 946 F.2d at 803 ("a manipulative device or contrivance . . .can be any false statement of material fact in connection with a discrete purchase or sale of a security").

For precisely the same reasons, each sale or purchase of securities by a corporate insider while in possession of material nonpublic information constitutes a distinct offense under the third prong of Rule 10b-5. Under the plain language of the Rule, a violation of clause (c) consists of "any *act*, practice *or* course of business" that would operate as fraud or deceit upon any person in connection with the purchase or sale of any security, regardless of whether this conduct would also violate the "scheme to defraud" provision in clause (a).

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[3] In *Schad*, the plurality opinion made it clear that the question whether a statute defines multiple acts as separate offenses or as alternative, disjunctive means of committing a single offense, is a matter, in the first instance, a "question of statutory interpretation" and must be undertaken with respect to the particular statute in question. *Schad*, 501 U.S. at 636; *see also Edmonds*, 80 F.3d at 815; *United States v. Correa-Ventura*, 6 F.3d 1070, 1081 (5th Cir. 1993). The Tenth Circuit apparently disagrees (in the absence of a dispositive Supreme Court precedent), since the circuit failed even to discuss the question whether the statutory language makes each false statement a separate offense.

Here, there can be no question but that the applicable provisions make each false statement in connection with the sale of securities a separate offense, even if all the statements are part of a single scheme.

Instructive in this regard is the body of case law interpreting section 14(a)(3) of the Securities Act of 1933, 15 U.S.C. § 77q(a), which employs virtually identical language as Rule 10b-5.[4] Courts have uniformly held that each sale of securities is a separate offense. *See United States v. Dioguardi*, 492 F.2d 70, 83 (2d Cir.) (imposing consecutive sentences for each sale in violation of section 14(a)), *cert. denied*, 419 U.S. 873 (1974); *accord United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975); *United States v. Waldman*, 579 F.2d 649, 654 (1st Cir. 1978). As these cases have recognized, *each* transaction based on insider information operates as fraud upon the investing public and constitutes a separate offense. *Dioguardi*, 492 F.2d at 83. The same reasoning should apply to Rule 10b-5(c).

By its terms, Count 2 combined six distinct "untrue statement" offenses by alleging that Mr. Wiles committed securities fraud in violation of Rule 10b-5(b) by making allegedly false and misleading statements in *any one of six* separate documents directed to different persons between March and November of 1988. Count 2 further alleged that Mr. Wiles engaged in insider trading in violation of Rule 10b-(5)(c), by selling a small portion of his holdings in MiniScribe *either* in April *or* in May of 1988. The result is an indictment that charged Mr. Wiles with making one false statement in March, and another false statement in April, and another false statement in May . . . and with engaging in insider trading in April and engaging in insider

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[4]Section 14(a) provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly -

. . . (3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.

trading in May. Because the jurors were not required to agree on any particular false statement or any particular trades, it is impossible to know whether the jury agreed on the same offense in delivering its verdict.

B. The Jury Instructions Failed to Require a Unanimous Verdict on any Particular Offense.

The district court's initial instructions to the jury on Count 2 required them to agree on a "means or method" by which Mr. Wiles was alleged to have violated Rule 10b-5 without stating what constitutes such a "means or method," thereby leaving the jury with no guidance on just what they had to find unanimously. App. D1-2. Not surprisingly, the jury expressed in writing its clear confusion over how to address the "many individual charges in each count of the indictment." App. D3. The court responded by directing the jury that they only had to agree that Mr. Wiles had made some false statement, or had engaged in insider trading on some occasion, or had engaged in a scheme to defraud.[5] The jury did not have to find that Mr. Wiles engaged in a scheme

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[5]The Court stated:

> In Count 2, the government alleged that in connection with the purchases and sales of MiniScribe stock, the defendant, Q. T. Wiles, . . . *one*, employed a device, scheme or artifice to defraud. This refers to the *scheme to conceal an inventory shortage. Or*, two, made untrue statements of material facts or made material omissions of fact causing statements made to be misleading. This refers to false statements in the annual reports. *Or*, three, engaged in a fraud and deceit upon MiniScribe shareholders and unwitting purchasers and sellers of the stock. This refers to insider trading, that is, using insider information on the sale of his stock. App. D3-4 (emphasis added).

By contrast, in Count 1 where only *one report* was at issue, the Court correctly instructed the jury that, given that the report contained multiple false statements, "Each juror must agree with each of the other jurors, however, that the *same* statement or representation alleged in Count 1 to be false, fictitious or fraudulent, is, in fact, false, fictitious or fraudulent." App. D1 (emphasis added).

to defraud in order to convict him of making false statements or engaging in insider trading. And they could convict him of making false statements without agreeing on which false statement; similarly, they could convict him of engaging in insider trading without agreeing on which trades constituted insider trading. The district court's instructions and the resulting confusion are symptomatic of the pervasive conflicts among the circuits on this constitutional question, as shown below.

C. The Tenth Circuit's Decision and Approach on the Unanimity Issue Are Contrary to the Law in Other Circuits.

The Tenth Circuit's reason for ignoring the obvious possibility of a non-unanimous verdict — that all these statutorily separate offenses were committed as part of "an ongoing scheme to defraud," *Wiles*, 102 F.3d at 1062 (App. A34-35) — violates the long-standing rule that "Appellate Courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991).[6] It also puts the Tenth Circuit in conflict with several other circuits on the constitutional unanimity requirement.

1. The Tenth Circuit Decision is Inconsistent with Cases Requiring Unanimity on Distinct Offenses as Defined by the Statute.

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[6] As Judge Matsch noted, one could only speculate as to whether the jury based its verdict on a scheme to inflate MiniScribe's inventory, on false statements, or on insider trading. *See infra*, note 1; see also *United States v. Apodaca*, 843 F.2d 421, 430 (10th Cir.) (court of appeals cannot affirm on basis that would "enable the defendant's conviction to rest on one point and the affirmance of the conviction to rest on another"), *cert. denied*, 488 U.S. 932 (1988)

The plurality opinion in *Schad* held that whether a statute defines multiple acts as separate offenses or as alternative means of committing a single offense must be determined by examining the statute at issue. *Schad*, 501 U.S. at 636. Unlike the Tenth Circuit, which found it sufficient that the various acts alleged in Count 2 allegedly constituted a continuing scheme, other circuits have examined the relevant statutes in order to determine the proper level of unanimity. *E.g., Edmonds*, 80 F.3d at 815 (interpreting the Continuing Criminal Enterprise Act to require unanimity as to the same three predicate criminal offenses); *United States v. Correa-Ventura*, 6 F.3d 1070, 1082-1084 (5th Cir. 1993) (interpreting 18 U.S.C. § 924(c) not to require unanimity that the same gun was used in relation to a violent crime).

By contrast, the Tenth Circuit in this case made no reference whatsoever to the statute and Rule 10b-5, which clearly define each false statement and each insider sale as separate offenses requiring unanimity. The Tenth Circuit's decision is thus in conflict with the decisions of other circuits and with the plurality's opinion in Schad.[7]

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[7]For the notion that unanimity is unimportant if all the separate offenses are part of a single scheme, the Tenth Circuit relied on a mail fraud case. *See id.* (citing *United States v. Crummer*, 151 F.2d 958, 964 (10th Cir. 1945), *cert. denied*, 327 U.S. 785 (1946)) App. A35. The Tenth Circuit's reliance on *Crummer* only underscores the need (emphasized by the plurality in *Schad*) for close attention to the statute in question. The mail fraud statute at issue in *Crummer* is fundamentally different from section 10(b) in the way it defines the elements constituting the offense. The mail fraud statute establishes two constituent elements of an offense, a scheme to defraud *and* the use of mails in furtherance of that scheme. *See Crummer*, 151 F.2d at 962-964. The court in *Crummer* explicitly recognized that even though there was more than one mailing, there was but "a single offense consisting of those two elements." *Id.* at 964. By contrast, Mr. Wiles was charged under a statute which, as shown above, proscribes engaging in a scheme to defraud, *or* making false statements, *or* engaging in insider trading.

2. The Tenth Circuit Decision is Inconsistent With Cases Requiring Unanimity on the Factual Basis of the Conviction.

With respect to *each* of the six allegedly false reports incorporated in Count 2, the government was required to prove that each statement was materially false or misleading, and that petitioner knew the statement to be false at the time it was made. Because the statements alleged to be false and MiniScribe's financial conditions varied from quarter to quarter, proof of falsity for each statement required evidence of quite disparate facts. Furthermore, because the statements were made in different documents on different dates, proof of scienter also required evidence of different facts: As the government put it, conviction required the jury to determine "what did [Mr. Wiles] know and when did he know it." Unfortunately, the jury was not required to *agree* on what Mr. Wiles knew or when he knew it, what statements he knew to be false, or when he knew them to be false.[8]

It is entirely possible, if not probable, that some members of the jury agreed that petitioner knew the falsity of one report at one particular time, while the other members believed that petitioner knew the falsity of some other statement in a different report at some other time. In holding that unanimity was *not* required in these circumstances, the Tenth Circuit's decision departs from decisions of numerous other circuits, including the Ninth Circuit's approach outlined in *United States v. Payseno*, 782 F.2d 832 (9th Cir. 1986).

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[8]Likewise, the insider trading charges also required proof of the particular material nonpublic information which Mr. Wiles allegedly possessed at different times. The jury was not required to agree that Mr. Wiles possessed inside information on any particular occasion, or that any particular trade was based on that information.

In *Payseno*, the indictment charged defendant in a single count with extortion on three occasions, in April, May and December, respectively. *Payseno*, 782 F.2d at 835. On appeal, the Ninth Circuit reversed, holding that the failure to give a specific unanimity instruction constituted plain error. The Court explained that "there exists a genuine possibility that some jurors may have believed [that defendant] used extortionate means on one occasion while others may have believed that he was guilty of engaging in extortion at a different time and place." *Id.* at 837. A guilty verdict could not stand in these circumstances. *Id.*[9]

Similarly, in *United States v. Holley*, the Fifth Circuit reversed a perjury conviction, obtained under a general unanimity verdict, where a single count alleged eleven separate false statements as possible bases for conviction. 942 F.2d at 927-29; *see also United States v. Bins*, 331 F.2d 390, 393 (5th Cir.) (specific unanimity required when count alleged filing multiple false documents with the Federal Housing Administration because each filing is a separate offense), *cert. denied* 379 U.S. 880 (1964).

3. The Tenth Circuit Decision is Contrary to Circuits Holding that Agreement on "Means or Methods" Is Insufficient in the Absence of Agreement on a Particular Offense.

The Tenth Circuit held it sufficient that, in response to the jury's expressed confusion, the trial court instructed them that they merely had to agree on a particular "means or method" of violating Rule 10b-5. As courts rejecting the "means or methods" instruction make clear, the problem

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[9] In *Payseno*, this error was deemed so obvious that the *district court* initially ordered a new trial because of the lack of assurance that the verdict reflected a unanimous finding as to any one offense, but the court reversed itself because it doubted its authority to grant a new trial *sua sponte*. *See id.* at 834.

with this approach is that within each means or method, the government charged numerous separate offenses. The district court interpreted the making of a false statement as a "means or method" of violating Rule 10b-5. The court's instruction made clear to the jury that, so long as they agreed that Mr. Wiles violated the statute by making false statements, they did not need to agree on which false statements he made and which statement led any shareholder to purchase or sell MiniScribe's stock.[10] Thus, even if the jury conscientiously followed the district court's instructions, it could still have found petitioner guilty without agreeing that any particular false and misleading statement or any particular sale of stocks violated the law.

The Third Circuit expressly rejected the argument that jury agreement on a "means or methods" was sufficient to protect the right to a unanimous verdict where, as here, each such "means or method" encompassed more than one offense under the statute. *See Beros, supra*, 833 F.2d 455. In *Beros*, the trial court's instruction required jury unanimity as to a theory of liability, or as to a "method, mode or manner," of violating 29 U.S.C. § 501(a) and 18 U.S.C. § 664. *Beros*, 833 F.2d at 460. Nevertheless, the Third Circuit reversed the defendant's conviction. The court noted that, even if the jury agreed on a theory of liability, *i.e.*, embezzlement, theft, abstraction, or conversion of funds of a pension fund, the count alleged three separate acts *each* constituting separate offenses. Thus, the jury could have all

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[10]This approach may be akin to the "distinct conceptual groupings" disapproved by the plurality in *Schad. Schad*, 501 U.S. 634-636 (disapproving *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977)). The *Gipson* court used its "distinct conceptual groupings" standard to conclude that a variety of alternatives that the statute listed as separate means or methods were actually distinct offenses. Although the issue is not free from doubt, no court appears to have applied the *Gipson* standard to hold that offenses defined by the statute as separate are actually alternate means or methods which do not require unanimity.

agreed that each alleged offense constituted, say, theft, but could have been divided as to which theft was in fact committed. The danger of non-unanimity on a particular offense required an instruction requiring the jury to "match that [theory] to another unanimous finding regarding a particular act." *Beros*, 833 F.2d at 461.

Here, as in *Beros*, the jury may have agreed on a "means or method." The jury may have agreed that Wiles violated the statute by making some false statement to shareholders. But, as in *Beros*, they could have done so without agreeing on any particular false statement offense.

4. The Tenth Circuit's View that a General Unanimity Instruction Satisfies the Constitutional Requirement is a Legal Fiction Rejected by Other Circuits.

In rejecting Mr. Wiles' Sixth Amendment claim, the Tenth Circuit held that a general unanimity instruction of the kind given by the district court here " 'suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict.' " *Wiles*, 102 F.3d at 1062 (citing *United States v. Sasser*, 971 F.2d 470, 477 n.5 (10th Cir. 1992), *cert. denied*, 507 U.S. 924 (1993) and *United States v. Phillips*, 869 F.2d 1361, 1366 (10th Cir. 1988), *cert. denied*, 490 U.S. 1069 (1989)); App. A35-36.

As we demonstrated above, *after* the jury received the "general unanimity" instruction, the jury informed the court in plain terms that it did not know what sort of unanimity was required as to the "many individual offenses contained in each count of the indictment." App. D3. The trial court responded with an instruction which admonished the jury that they only had to agree that Mr. Wiles had made false statements (without requiring an agreement on any particular false statement) or agreed that he had engaged in insider

trading (without requiring an agreement on insider trading on any particular occasion) App. D3-4.

To pretend that the jury followed a general unanimity instruction that it said it did not understand, and that the jury subsequently agreed on a particular offense when it was not instructed by the court to do so, is to embrace a legal fiction which renders the unanimity requirement an illusion.

Not surprisingly, other circuits reject the adequacy of a general unanimity requirement in just such circumstances. *See, e.g., Echeverry*, 719 F.2d at 975 (where the circumstances indicate a *genuine possibility or potential* for jury confusion on the unanimity requirement, the general unanimity instruction is inadequate and the jury must be instructed that they "agree to a particular set of facts" constituting the offense).[11] A specific unanimity instruction is required, not only when multiple offenses are charged in one count, but when any "other particular factor creates a genuine possibility of jury confusion." *Payseno*, 782 F.2d at 836 (*quoting United States v. Frazin & Miller*, 780 F.2d 1461, 1468 (9th Cir. 1986)). One such factor creating or evidencing jury confusion is, of course, a specific statement from the jury that they do not understand the unanimity that is required in the circumstances. *Duncan*, 850 F.2d at 1101; *Echeverry*, 719 F.2d at 975.

Indeed, the jury's confusion in this case is entirely understandable and reflects the pervasive confusion regarding the unanimity requirement among the lower federal courts. The

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[11] In fact, the Court of Appeals' opinion in *United States v. Sasser*, 971 F.2d 470, (10th Cir. 1992), *cert. denied*, 507 U.S. 924 (1993), acknowledges this conflict among the Circuits, noting that "other circuits have made exceptions to this rule." 971 F.2d at 478 (citing *Beros, supra*; *United States v. Hiland*, 909 F.2d 1114, 1140 n.44 (8th Cir. 1990); *United States v. Ryan*, 828 F.2d 1010, 1020 (3d Cir. 1987); *United States v. Busacca*, 863 F.2d 433, 437 (6th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989)).

district court's instructions themselves reflected the conflicting approaches taken by the lower federal courts, by requiring unanimity on predicate acts as to Counts 1 and 3, App. D1, D2-3, while employing a "means or method" test as to Count 2 that did not tell the jury what they unanimously had to find. App. D1-2. The jury thus faced the difficult task of deciphering the appropriate level of unanimity as to each Count in light of the conflicting instructions that in part reflect competing theories. As further discussed below, in the absence of an authoritative opinion from this Court, the lower federal courts face the same dilemma that confused the jury and led the district court to err in this case.

D. This Case Is an Appropriate Vehicle for the Court to Resolve Issues Raised by its Opinions in *Schad v. Arizona.*

A critical constitutional issue — on what facts, theories or offenses must a jury reach agreement in federal prosecutions — remains the subject of confusion and conflict in the circuits. The *Schad* plurality's insistence that the issue was, in the first instance, a matter of statutory interpretation, was apparently deemed unpersuasive in the Tenth Circuit. The Court invoked its "single scheme" approach without regard to the terms of the statute. The Second circuit adopted a similar approach in *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992) ("acts that could be charged as separate counts . . . may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme") (internal quotations omitted).

By contrast, although the plurality in *Schad* questioned the "distinct conceptual groupings" standard set out in *United States v. Gipson* 553 F.2d 453 (5th Cir. 1977), *Schad* at 634-636, the Fifth Circuit continues to treat *Gipson* and its progeny (including *Bins, supra.*) as good law.

Holley, 942 F.2d at 927. Likewise, while the Third Circuit in *Edmonds* has interpreted *Schad* to require specific unanimity as to the predicate acts constituting an offense under the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, the District of Columbia Circuit has held that specific unanimity is not required in the same circumstances. See *United States v. Anderson*, 39 F.3d 331 (D.C.Cir. 1994), *cert. denied*, 116 S. Ct. 542 (1995). The Sixth Circuit, on the other hand, has adopted a vague standard, characterizing the inquiry as whether "traditional notions of due process" would be offended by joining two offenses in a single count. *See United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992).

Accordingly, this case warrants review by the Court, in order to resolve the question of appropriate inquiry to be undertaken in determining the central meaning of jury unanimity — an issue that was not resolved by a majority of the Court in *Schad*. The issue here arises in connection with an important federal criminal statute, Section 10(b) of the Securities and Exchange Act of 1934, and its implementing rule, Rule 10b-5. But the case has far broader significance — a rule tying unanimity to distinct offenses and tying the definition of the offense to the statute in question would go a long way toward resolving the current confusion that governs every phase of the process, from the drafting of an indictment, to the instructing of the jury and the sentencing of the defendant.

II. The Tenth Circuit's Approach to the Application of *Gaudin* to Count 3 Is in Conflict with the Approach of Other Circuits, and Should Be Reviewed in Light of this Court's Anticipated Decision in *Johnson v. United States*.

Count 3 charged Mr. Wiles with wire fraud in violation of 18 U.S.C. § 1343. Although the trial court and the govern-

ment agreed that materiality was essential, and although the materiality of the statements at issue was hotly contested, the court failed to instruct the jury that they had to make the critical materiality determination. Indeed, not only did the court's instructions fail to require the jury to determine the materiality of the assertions, but the court's instructions as a whole strongly suggested that the materiality issue would be decided not by the jury, but by the court.[12]

As this Court made clear in *United States v. Gaudin*, Mr. Wiles had a constitutional right to have the jury determine whether he is guilty of every element of the crime. *Gaudin*, 115 S. Ct. at 2313. Because the instructions failed to require such a determination, and indeed suggested that no such jury determination was necessary, there is a "reasonable likelihood" that the jury was mislead and confused by the instructions as a whole in light of the entire trial record, and therefore applied it in a way that violates the Constitution. *Boyde v. California*, 494 U.S. 370, 380 (1990).

Application of *Gaudin* in these and related circumstances has produced a welter of conflicting opinions in the circuit courts; the Tenth Circuit affirmance here is in conflict with the Ninth Circuit's decision in virtually identical circumstances in *United States v. Nash*, 76 F.3d 282 (9th Cir. 1996).

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[12] Instructions " 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

A. The Instructions As A Whole Did Not Tell The Jury That They Must Determine the Materiality Of Statements Charged In Count 3.

The instructions in this case cannot fairly be read to charge the jury that *they* must find materiality for purposes of Count 3. With respect to Count 1, the court stated that "the government must prove the following four essential elements beyond a reasonable doubt" which elements, including materiality, were then enumerated. App. D5. The court then told the jury, contrary to the requirement of *Gaudin*, that the court would decide the element of materiality. App. D5.

With respect to Count 2, the court had instructed the jury that, "[i]f you should decide that a particular statement or a particular omission was false or misleading at the time that it was made, *then you must determine if the fact stated or omitted was a material fact or a material omission* under the evidence received in this case." App. D45 (emphasis added).[13]

With respect to the wire fraud charge in Count 3, the district court's instruction followed the same structure as in Count 1: the court first stated that "the government must

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[13]Had the multiple false statement charges in Count 2 been set forth in separate counts, as they should have been, the jury's verdicts in those counts may have indicated whether they found the statements submitted to SCB material. An appellate court may then be in a position to determine whether the jury necessarily found the materiality element in Count 3 by their finding in Count 2. See *California v. Roy*, 117 S. Ct 337, 339-40 (1996) (Scalia, J., concurring) (where an element of the offense is removed from a jury's consideration, the error may be harmless only if another finding "effectively embraces" a finding on the removed element). However, due to the improper joinder of multiple offenses in Count 2, including various alleged false statements not at issue in Count 3, one cannot tell what the jury decided in Count 2. Moreover, given the *Gaudin* error on Count 1, it cannot be assumed that the jury found *any* alleged false statement material.

prove the following three essential elements beyond a reasonable doubt," and went on to enumerate the elements, including that a fraudulent statement had to be a material statement. App. D6. However, the district court did not state that the jury should decide materiality. App. D6.

Moreover, the court not only failed to inform the jury that, in contrast to Count 1, it was *their* responsibility to make the materiality determination on Count 3, the court expressly linked Counts 1 and 3, informing the jury that the same false statements were at issue in both. The court stated:

> "Count 3 is an allegation that the defendant defrauded Standard Chartered Bank by the scheme described in [sic] he indictment, *using the false statements alleged in Count 1,* and that money was transferred by wire in furtherance of that scheme.
>
> *So just as with Count 1,* while not all of the false statements alleged there must be proved, the jury must be satisfied beyond a reasonable doubt that at least one false statement was made, and you must all agree on that same one." App. D7 (emphasis added).

Here, the court not only fails to require the jury to make the critical materiality determination, the court tells the jury that the false statements at issue in Count 3 are the same false statements at issue in Count 1, as to which the court had already informed the jury that the court would make the requisite materiality determination.

Thus, there is more than a reasonable likelihood that the jury never considered the materiality of the allegedly false statements in the 1987 annual report. See *Francis v. Franklin*, 471 U.S. 307, 319-322 n. 7 (1985) (noting that a reasonable juror is likely to attempt to understand language of a later instruction by reference to the earlier instruction regarding to the same element). Absent a specific instruc-

tion to the contrary, the jury was effectively directed that the court would decide materiality for both Counts 1 and 3. As a result, because of the *Gaudin* error as to Count 1, the jury likely did not make any materiality determinations as to Count 3.

B. The Tenth Circuit's Analysis Is In Conflict With The Ninth Circuit's Approach In *Nash*.

The Tenth Circuit's decision on this issue is in conflict with the Ninth Circuit's decision in *Nash*, another post-*Gaudin* case addressing a nearly identical situation. In *Nash*, the defendant was charged with making false statements to a federally insured lending institution, in violation of 18 U.S.C. § 1014 and 18 U.S.C. § 1344. 76 F.3d at 285. In instructing the jury, the district court defined materiality for the jury, by stating that § 1344 requires a statement that "would reasonably influence a bank to part with money," and that a "material" statement is one having the "capacity to influence the decision of a bank." 76 F.3d at 285-286 (internal quotations omitted). During its discussion of § 1014, the court instructed the jury that the false statements submitted by the defendant were "material *for the purposes of these instructions*." 76 F.3d at 286 (emphasis added).

The Ninth Circuit reversed the § 1014 conviction for clear failure to submit the materiality requirement to the jury. The Court also reversed the § 1344 conviction, because the court's determination of materiality for purposes of § 1014 "appeared to apply to both offenses on the elements of which the jury had just been instructed." 76 F.3d at 286.

Other Circuits have also held that an erroneous removal of an essential element of the offense in one count leads to the jury's failure to consider the same element in another count. For example, in *United States v. Robinson*, 887 F.2d 651, 654-655 (6th Cir. 1989), the defendant was

charged with a count of intimidating a witness in violation of 18 U.S.C. § 1512 (Count I), and another count of bribery with intent to influence the same witness's testimony in violation of 18 U.S.C. § 201 (Count II). The trial court erroneously required the defendant to stipulate to two elements of the bribery count — knowledge that the person bribed would be a witness and intent to influence testimony — in order to receive an entrapment instruction on the intimidation count. *Id.* at 653-54. The Court of Appeals for the Sixth Circuit reversed on *both* counts, finding that the error in Count II raised the danger that the jury would treat the knowledge and intent elements as having been established for purposes of Count I, given that the two counts addressed defendant's conduct towards the same witness occurring around the same time. *Id.* at 654-55.

The instant case is indistinguishable: the *Gaudin* error in Count 1 occurred with respect to the same element of materiality that was contested in Count 3 and concerned the very same statements alleged to be fraudulent in Count 3. The district court repeatedly instructed the jury that the statements at issue were the same in both counts. Accordingly, there is more than a reasonable likelihood that the jury never considered the contested issue of materiality in Count 3. *See also United States v. Johnson*, 71 F.3d 139, 145-146 (4th Cir. 1995) (*Gaudin* error, removing from jury's consideration an element of the offense of armed robbery of a credit union, requires reversal of conviction for use of firearm during a crime of violence).

Because this Court has already granted *certiorari* in *Johnson v. United States* to resolve the growing conflict among the circuit courts as to the application of *Gaudin*, Wiles respectfully submits that the writ should be granted here for similar reasons, and that this case should be resolved in light of *Johnson*, or remanded for reconsideration by the 10th Circuit in light of *Johnson*.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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May 9, 1997.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,
v.
Quentin T. WILES, *Defendant-Appellant.*

UNITED STATES of America,
Plaintiff-Appellee,
v.
Patrick J. SCHLEIBAUM,
Defendant-Appellant.
Nos. 94-1592, 95-1022.

United States Court of Appeals,
Tenth Circuit.

Dec. 10, 1996.

Before SEYMOUR, Chief Judge, and PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, and MURPHY, Circuit Judges, as to Part II.A*

Before BALDOCK, SETH, and BRORBY, Circuit Judges, as to Parts I. & II.B-F.*

BALDOCK, Circuit Judge.

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*Prior to release of the panel's opinion in these appeals, a majority of the court's active judges voted to rehear Part II.A of the opinion en banc. For purposes of oral argument, the court consolidated these appeals with *United States v. Pappert*, No. 95-3071 (10th Cir., filed March 10, 1995), a portion of which the court also voted to rehear en banc. The en banc court now resubmits *Pappert* to the original panel for decision consistent with Part II.A of this opinion.

The late Honorable Oliver Seth, United States Senior Circuit Judge, heard oral argument and participated in the panel's conference of these appeals. Prior to his death, Judge Seth concurred in all but Part II.A of the opinion. Judge Seth did not participate in that portion of the opinion, which was reheard en banc.

Miniscribe was a Colorado-based manufacturer of computer hard disk drives. These criminal appeals arise from its management's fraudulent cover-up of a multimillion dollar inventory overstatement between December 1986 and January 1989, which falsely inflated Miniscribe's profits and accelerated its descent into bankruptcy.

Defendant Patrick J. Schleibaum is the former chief financial officer and vice president of Miniscribe. Schleibaum was charged in a two-count criminal indictment with making false statements to the government in violation of 18 U.S.C. § 1001, and securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff(a) and 17 C.F.R. § 240.10b-5. Schleibaum's trial commenced in June 1994. The government called twenty-nine witnesses over the course of seven days for its case-inchief. Schleibaum's defense consisted of his testimony and that of Miniscribe's former director of far east operations. The jury convicted Schleibaum on both counts. The district court fined Schleibaum $6,000 and sentenced him to twenty-four months imprisonment on each count to run concurrently.

Defendant Quentin T. Wiles is the former chairman of the board and chief executive officer of Miniscribe. Wiles was charged in a threecount criminal indictment with making false statements to the government in violation of 18 U.S.C. § 1001, securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff(a) and 17 C.F.R. § 240.10g-5, and wire fraud in violation of 18 U.S.C. § 1343. Wiles' trial commenced in July 1994. The government called thirty-four witnesses over the course of eleven days for its case-in-chief. Wiles' defense consisted of twelve witnesses, including himself, over the course of two and onehalf days. The jury convicted Wiles on all three counts. The district court fined Wiles $60,000 and sentenced him to thirty-six months imprisonment on each count to run concurrently.

Both Defendants appeal their convictions urging numerous grounds for reversal. Because both cases arise from the same fraudulent coverup and present overlapping factual and legal issues, we have consolidated our disposition of these appeals. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm in part and vacate in part.

I.

Miniscribe began operations in 1981 in Longmont, Colorado. Miniscribe was then a privately owned company manufacturing computer disk drives in the basement of its founder, Terry Johnson. Miniscribe went public in 1983, but soon grew beyond its capacity. In 1985, a venture capital group, Hambrecht & Quist, invested $20,000,000 in Miniscribe and gained control of its management. By 1986, Miniscribe was an overtly profitable, publicly-owned corporation with operations in Colorado, Hong Kong, and Singapore. Miniscribe, whose common stock was traded on the NASDAQ, was subject to the Securities Exchange Act of 1934, as well as the rules and regulations of the Securities and Exchange Commission (SEC).

Following its change in management, chairman of the board and chief executive officer Quentin T. Wiles headed Miniscribe from his office in Sherman Oaks, California. Wiles had a reputation as a successful, demanding executive who expected performance. Salaries and bonuses at Miniscribe often depended upon Miniscribe "making the numbers."

Assisting Wiles was a management team consisting largely of certified public accountants. Patrick J. Schleibaum initially served as Miniscribe's chief financial officer. Wiles' management team also included president, chief operating officer and board member Gerald Goodman, executive vice president Jesse C. Parker, director of far east operations Paul Lyons, division managers Owen P. Taranta

and Warren Perry, and operations controllers Kenneth A. Huff and Steven Wolfe. William P. Lorea later joined Miniscribe as chief financial officer when, in the midst of trouble, Wiles moved Schleibaum to vice president. Wiles was in constant contact with his management team through phone calls and faxes, as many as fifteen of each, every business day.

A.

Despite reported growth and profitability, Miniscribe's financial position began to deteriorate early in 1987. In January 1987, Miniscribe conducted its annual inventory count to determine the value of inventory on hand. The accuracy of the inventory count was critical to the proper preparation of Miniscribe's 1986 year end financial statements.

Management retained the independent accounting firm of Coopers & Lybrand to audit Miniscribe and verify the accuracy of its inventory count. The standard procedure for verifying a company's inventory count is through a test count — an inventory sampling deemed representative of the entire inventory. Problems arise when, unbeknownst to the auditors, management detected an inventory hole of between $2,000,000 and $4,000,000.

The inventory hole appeared because the actual inventory count, and thus dollar value of the inventory, was less than the value of the inventory recorded on Miniscribe's books. When the value of book inventory is overstated, the cost of goods sold is correspondingly understated. The understated cost of goods sold is then subtracted from the net sales resulting in inflated profits equal to the amount of the inventory hole or overstatement.

Huff, Perry, and Wolfe discussed the problem with Schleibaum. At this point, Wiles was unaware of the

inventory hole. Schleibaum properly decided to charge a portion of the hole against an emergency fund known as inventory reserves. The remainder of the hole also should have been charged off or expensed as a cost of goods sold with a corresponding reduction in profits. But when Perry suggested this approach, Schleibaum balked. Instead, Schleibaum directed his subordinates to conceal the remainder of the inventory hole through improper means so that Miniscribe could continue to "make the numbers."[1]

With Schleibaum's knowledge and approval, Wolfe and Perry decided to cover the inventory hole by falsely inflating the inventory count. To hide the false count from the auditors, Wolfe and Perry broke into the auditors' work trunks at Miniscribe after business hours and altered the test count to match the inflated inventory count. The inflated numbers were then entered into Miniscribe's computer system and reflected as additional inventory. Schleibaum signed a management representation letter to the auditors indicating Miniscribe's financial statements were accurate, including its inventory valuation. Miniscribe cleared the 1986 audit.

Miniscribe reported the false profits resulting from concealment of the inventory hole on its 1986 income statement and 1987 first quarter earnings statement. Miniscribe disseminated this information to the public through its 1986 annual report and 1987 first quarter financial report. Schleibaum signed the 1986 10-K report and 1987 first quarter 10-Q report which contained Miniscribe's false financial statements. Miniscribe filed the 10-K and 10-Q reports with the SEC as required by law. Miniscribe's

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[1] For a good discussion of how income may be manipulated through inventory accounting, see Belverd E. Needles, Jr., *Financial Accounting* 360-62 (5th ed. 1995).

reported success allowed the company to raise funds through a $97,000,000 issue of debentures early in 1987.

B.

In the spring 1987, Wiles became concerned about Miniscribe's internal controls and financial strength. At management's quarterly meeting in July 1987, Parker expressed concern to Wiles about inventory control in Miniscribe's far east operations. In August 1987, Wiles traveled to the far east to review Miniscribe's operations in Hong Kong and Singapore. Wiles found a complete loss of inventory control in Miniscribe's Singapore facility. Wiles largely blamed Schleibaum for the loss of inventory control. Upon his return, Wiles removed Schleibaum to vice president and made Taranta acting chief financial officer.

Wiles believed that if an inventory problem actually existed, Miniscribe and its officers might be liable to those investors purchasing the recently issued debentures on the company's reported financial strength. At Wiles' direction, Taranta and Huff researched the inventory problem. In the fall of 1987, Taranta and Huff detected a $15,000,000 inventory hole at Miniscribe, the largest portion of which was located in the company's Colorado operation. At this point Miniscribe's financial statements for 1986 and the first two quarters of 1987 should have been restated to reflect a write off of the inventory hole and consequent reduction in profits. Instead, on October 12, 1987, Miniscribe filed a third quarter 10-Q report with the SEC which failed to account for the problem.

On October 14, 1987, Miniscribe's management team met at Wiles' office in Sherman Oaks, California. Those present included Wiles, Schleibaum, Goodman, Parker, Taranta, and Huff. Directly prior to the meeting, Goodman informed Wiles of the inventory problem. Wiles became visibly upset, blaming Schleibaum and Goodman for failing

to control operations. Wiles told Schleibaum and Goodman to stay out of the way; Wiles and Taranta would find a solution to the problem.

At the meeting, Taranta presented a report which he and Huff had completed the previous evening. The report set forth a detailed analysis of the inventory hole. In the report, Taranta proposed to cover nearly $8,000,000 of the hole through various means. Wiles rejected the idea, telling Taranta and the others to "think big chunks." Wiles suggested "grossing up" or adding value to the inventory. Schleibaum suggested increasing the value of fixed assets or failing to record certain liabilities. Taranta rejected these suggestions because the independent auditors might detect such measures. Without deciding the specifics, Wiles concluded that management should hide the inventory hole for the present time. Wiles directed Taranta to destroy all copies of the report. Shortly thereafter, Schleibaum, Huff, and Taranta met to discuss the details of the cover-up.[2]

In late October 1987, the stock market declined sharply. Miniscribe's reserves were minimal and unable to absorb a large inventory write off without affecting profits. Lorea, who Wiles had recently hired to become Miniscribe's chief financial officer, nevertheless suggested that the time was proper to write off the inventory hole. Taranta and Goodman agreed. Because Miniscribe's stock value already was depressed, a reported decline in Miniscribe's profits was unlikely to affect its stock value significantly. Wiles rejected the idea. Instead, Wiles convened a second meeting of management in November 1987 to discuss the inventory problem.

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[2] After meeting with Wiles, members of management generally would prepare "What I Heard" memos and deliver them to Wiles. This way, Wiles could be sure that management understood his directions. Interestingly, no one attending the October 14, 1987 meeting prepared a "What I heard" memo for Wiles.

Wiles, Schleibaum, Taranta, Goodman, Huff and Lorea attended the second meeting on November 17, 1987 in San Francisco at the offices of Hambrecht & Quist, which continued to control Miniscribe. The group discussed the upcoming 1987 audit. Wiles used extremely harsh language when addressing the inventory problem. Wiles had decided that Miniscribe could not afford to write off the inventory hole in 1987, but instead had to cover it up to maintain investor confidence. Wiles planned to write off the inventory hole over six quarters, beginning with the first quarter of 1988. Wiles concluded the meeting by scanning the conference table, stopping at Schleibaum, and stating to Taranta: "Owen, if anyone doesn't cooperate, or anyone gets in the way, you let me know and I'll deal with it."

In December 1987, independent auditors began preparing for Miniscribe's 1987 year end audit. Miniscribe again faced the problem of clearing the independent audit. Taranta and Lorea met with Wiles in California on December 4, 1987, while en route to review Miniscribe's far east operations. Taranta explained the plan to clear the audit to Wiles. At the conclusion of the meeting, Wiles informed Lorea that because of the inventory problem, Lorea would not have to sign Miniscribe's 1987 10-K Report. Schleibaum later confirmed this with Lorea. Around the same time, Wiles also told Goodman to stay clear of the problem because the government "wouldn't put a seventy year old man [Wiles] in jail." Upon their arrival in Singapore, Taranta and Lorea met with Schleibaum, Parker, Lyons, and others to again discuss the details of covering the inventory hole.

In mid-December 1987, Miniscribe's management, with Wiles' approval and Schleibaum's assistance, engaged in an extensive cover-up which included recording the shipment of bricks as in-transit inventory. To implement the plan, Miniscribe employees first rented an empty warehouse in Boulder, Colorado, and procured ten, forty-eight foot exclu-

sive-use trailers. They then purchased 26,000 bricks from the Colorado Brick Company.

On Saturday, December 18, 1987, Schleibaum, Taranta, Huff, Lorea and others gathered at the warehouse. Wiles did not attend. From early morning to late afternoon, those present loaded the bricks onto pallets, shrink wrapped the pallets, and boxed them. The weight of each brick pallet approximated the weight of a pallet of disk drives. The brick pallets then were loaded onto the trailers and taken to a firm in Larimer County, Colorado.

Miniscribe's books, however, showed the bricks as in-transit inventory worth approximately $4,000,000. Employees at two of Miniscribe's buyers, CompuAdd and CalAbco, had agreed to refuse fictitious inventory shipments from Miniscribe totalling $4,000,000. Miniscribe then reversed the purported sales and added the fictitious inventory shipments into the company's inventory records.

Additionally, the officers employed other means to cover the inventory hole, including: (1) recording the shipment of nonexistent inventory from Colorado to the far east, (2) packaging scrap as inventory, (3) double counting inventory, and (4) failing to record payables upon the receipt of materials. These various means distributed the inventory hole throughout Miniscribe's three facilities making the problem more difficult for the independent auditors to detect.

Again, Schleibaum signed a management representation letter to the auditors stating Miniscribe's 1987 financial reports were accurate and truthful. Miniscribe cleared the independent audit. The result of the cover-up was that, for 1987, Miniscribe's book inventory and reported profits were overstated by approximately $15,000,000 and $22,000,000

respectively.[3] These figures represented 17% of Miniscribe's inventory and 70% of its profits for the year. Despite Wiles' and Schleibaum's earlier representations, Wiles directed Lorea to sign Miniscribe's 1987 10-K report to the SEC.

For the year 1987, Miniscribe reported a 96% increase in revenues over 1986. Profits before taxes were $33,000,000, a 44% increase over 1986. Miniscribe's net income increased 37% to 82 cents per share, as compared with 63 cents per share in 1986. Stockholders equity reportedly increased 53%. Wiles' announcement to stockholders in Miniscribe's 1987 annual report stated: "We achieved the best results in the company's history and now have ten consecutive quarters of increased revenues and earnings .... 1987 was a great year and the outlook for 1988 looks even better." Press releases and ads appearing in the *Wall Street Journal* touted Miniscribe's reported success.

C.

But 1988 saw Miniscribe's house of cards collapse. As Wiles had planned, Miniscribe wrote off $7,000,000 of the inventory hole over the first three quarters of 1988. Wiles planned to write off an additional $3,000,000 of the inventory hole in the fourth quarter of 1988, and the remainder over the first two quarters of 1989. Due to market conditions resulting in poor returns, however, Wiles directed management to write off only $600,000, attributable to Hong Kong operations, in the fourth quarter. Thus, Miniscribe had written off only $7,600,000 of a planned $10,000,000 write off in 1988.

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[3]Consistent with accounting principles, $15,000,000 of Miniscribe's reported profits was attributable to the $15,000,000 inventory hole, without adjustment for taxes. The remaining $7,000,000 of profits was attributable to other adjustments such as unrecorded liabilities.

Meanwhile, a significant downturn in the market for hard disk drives during the third quarter of 1988 had concerned Miniscribe's principal lender, Bank of America. Miniscribe had a fully extended $35,000,000 revolving credit agreement with Bank of America. The bank rejected Miniscribe's request for further credit. About that time, however, Standard Chartered Bank of London (SCB) approached Miniscribe about a lending relationship.

Officers from SCB met with Wiles in July 1988. Wiles delivered Miniscribe's false financial reports to SCB. Based upon the reports, Miniscribe's projected outlook, and Wiles' representations, SCB extended Miniscribe $90,000,000 in credit, $60,000,000 of which Miniscribe used as working capital. SCB perfected a security interest in Miniscribe's inventory and receivables. On September 6, 1988, SCB satisfied Miniscribe's $30,000,000 indebtedness to Bank of America with a wire fund transfer through the Federal Reserve Bank of Chicago. On November 15, 1988, and again on January 3, 1989, Wiles met with officials from SCB to request additional credit of $30,000,000. SCB rejected Wiles' request. SCB eventually lost $30,000,000 to Miniscribe as a result of the cover-up.

Under increasing pressure, Schleibaum resigned as an officer of Miniscribe in June 1988. The next month, Schleibaum accepted a position with Sunward Technologies, a parts supplier to Miniscribe. During his tenure with Miniscribe, Schleibaum obtained approximately 116,000 shares of company stock at an approximate cost of $306,000.00. Schleibaum obtained his shares at a price significantly less than market through incentive stock options related to Miniscribe's performance, and through the company's employee stock purchase plan. As a top executive of a publicly-traded company, Schleibaum was well aware of the SEC's prohibition on insider trading. Nevertheless, between August 11, 1987 and January 26, 1989,

Schleibaum sold every share of Miniscribe he owned. Schleibaum's gross profits totalled $775,940.00.

Miniscribe's board of directors convened in Colorado on December 1, 1988. Wiles suggested to board member William Hambrecht of Hambrecht & Quist, whom Wiles had informed of the inventory hole in January 1988, that Miniscribe report a $40,000,000 loss in the fourth quarter of 1988. Hambrecht rejected the idea, suggesting that such a report would force Miniscribe's entire board of directors to resign. Instead, Miniscribe reported a $14,000,000 loss for the final quarter of 1988.

At this point, the outside directors, excepting Hambrecht, remained unaware of the scheme to cover the inventory hole. At the meeting, Goodman submitted a report to the board which summarized the company's condition. The report used phrases such as "weak cash position," "weak balance sheet," "cash flow negative," "living on old products," "not as profitable as required," and "out of control." A dispute arose between board members Wiles, Goodman, and Russell Planitzer. Goodman and Planitzer wanted to issue a press release informing the public of Miniscribe's weak condition. Wiles reluctantly agreed over Planitzer's threat to resign from the board.

D.

In January 1989, Wiles began spending more time at Miniscribe's headquarters in Longmont, Colorado. Wiles' plan was first to stabilize the company, then improve its performance. On January 3, 1989, Wiles sent Goodman a memo stating that in the future, "we will make not fake our numbers." But by this time, Miniscribe's outlook was hopeless. Wiles had lost control. Goodman, Parker and Lorea, among others, noted Wiles' distress. Wiles resigned his position as Miniscribe's chief executive officer and chairman of the Board on February 22, 1989.

Between 1985 and 1989, Wiles had acquired 780,517 shares of Miniscribe's common stock and 1,724 shares of the company's preferred stock. Wiles had initially invested $1,500,000 in Miniscribe in 1985 as part of Hambrecht & Quist's takeover. thereafter, he received discounted shares through warrants and stock options. Between April 27, 1988 and May 11, 1988, less than one year prior to his resignation, Wiles sold 150,000 shares of Miniscribe's common stock for $1,700,000. Wiles' profit before taxes and commissions amounted to $1,400,000. Wiles retained over 600,000 shares of Miniscribe's stock which eventually became worthless.

Richard Rifenburgh became Miniscribe's new chairman of the board and chief executive officer upon election at the February 22, 1989 board meeting. Shortly thereafter, Rifenburgh directed Parker to perform an inventory analysis. Parker informed Rifenburgh of the inventory hole and its cover-up. With the board's approval, Rifenburgh established an independent evaluation committee to investigate the matter.

On April 3, 1989, Rifenburgh issued a press release informing the public that Miniscrib's past financial reports could not be relied upon and that the company would delay releasing its 1988 financial reports pending the results of the investigation. Taranta resigned shortly thereafter. Miniscribe filed an incomplete 1988 10-K report with the SEC that same month. In December 1989, Miniscribe released corrected financial statements for 1986, 1987, 1988, and the first half of 1989. Early in 1990, Miniscribe filed for bankruptcy. NASDAQ delisted Miniscribe's common stock in February 1990. During the investigation, both Wiles and Schleibaum contacted members of Miniscribe's prior management team and urged them to reveal nothing. Schleibaum told Wolfe that if no one said anything only innuendo would exist. Schleibaum gave Wolfe the "shush"

sign. Similarly, Wiles Phoned Goodman to ask him and Lorea to say that management had done nothing illegal.

E.

A grand jury indicted Wiles and Schleibaum separately in March 1993. The indictment against Wiles alleged his participation in a scheme to defraud the SEC, SCB, and Miniscribe's shareholders and investors. The indictment alleged that Wiles joined the scheme in August 1987, when he instructed Taranta and Huff to research Miniscribe's inventory problem. According to the indictment, Wiles participation in the scheme ended in March 1989 after he instructed Goodman and Lorea not to incriminate anyone.

The indictment against Schleibaum similarly alleged his participation in a scheme to defraud the SEC and Miniscribe's shareholders and investors. The indictment alleged that Schleibaum joined the scheme in January 1987 when he learned of an inventory hole at Miniscribe and instructed Wolfe and Perry to conceal it. Schleibaum's participation in the scheme allegedly continued until August 1989 when he told Wolfe not to reveal any wrongdoing.

Count one of the respective indictments charged Wiles and Schleibaum under 18 U.S.C. § 1001 with making Miniscribe's false 1987 10-K report and filing it with the SEC. The count alleged that the report's financial statements fraudulently overstated inventory, income before taxes, and net income for 1987.

Count two of the respective indictments charged Wiles and Schleibaum with securities fraud under 15 U.S.C. §§ 78j(b), 78ff(a), and 17 C.F.R. § 240.10b-5. Specifically, the count alleged that Defendants' violated the securities laws by: (1) employing a scheme to defraud, (2) making untrue statements of material facts and failing to state material facts, and (3) engaging in deceitful acts and

practices, all of which defrauded Miniscribe, its shareholders and investors.

A third count against Wiles alone charged him with wire fraud under 18 U.S.C. § 1343. Specifically, count three alleged that Wiles, in furtherance of a scheme to defraud, caused SCB to make interstate wire transfers from Chicago, Illinois in excess of $70,000,000 for Miniscribe's benefit.

II.

On appeal, Wiles and Schleibaum present two common issues for our consideration. Both Defendants contend that: (1) the district court's failure to instruct the jury on materiality as an element of the false statements charges under 18 U.S.C. § 1001, constitutes reversible error under *United States v. Gaudin*, ____ U.S. ____, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), a decision rendered after Defendants' trials;[4] and (2) the securities fraud charges under 15 U.S.C. §§ 78j(b), 78ff(a) and 17 C.F.R. § 240.10b-5 were prejudicially duplicitous in that the charges alleged multiple means by which multiple false statements and acts constituted only one securities fraud scheme.

Additionally, Wiles and Schleibaum have preserved four separate issues for our review.[5] Wiles contends: (1) the

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[4]Wiles and Schleibaum also challenge the sufficiency of the evidence which the government presented on the § 1001 false statements charges, specifically on the element of materiality. The district court overruled Defendants' respective objections as to the sufficiency of the evidence. As will become apparent, a discussion of the sufficiency of the evidence on the element of materiality is unnecessary given our analysis of this first issue.

[5]Wiles raises two additional claims which he failed to raise in the district court: (1) the jury instructions as to the securities fraud charge improperly expanded the grand jury's indictment; and (2) the unanimity instruction as to the wire fraud charge was equivocal; both in violation of the Fifth Amendment. Applying the plain error analysis set forth in

government presented insufficient evidence of Wiles' knowledge of the fraudulent scheme to sustain his convictions under each of the three counts against him; (2) venue on the false statements charge under 18 U.S.C. § 1001 was improper in Colorado; and (3) the district court improperly admitted hearsay testimony as to the wire fraud charge under 18 U.S.C. § 1343 based on a "single scheme" theory. Schleibaum's sole individual contention is that Congress did not intend § 1001's general prohibition against making false statements to the government to apply to false SEC filings in view of 15 U.S.C. § 78ff, which specifically prohibits making false statements to the SEC.

We discuss each issue in turn.

A.

Wiles and Schleibaum first assert that the district court's failure to instruct the respective juries on materiality as an element of the false statements charges under 18 U.S.C. § 1001, constitutes error warranting reversal of their § 1001 convictions. Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title, or imprisoned not more than five years, or both.

United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), we conclude that Wiles' claims do not constitute plain error and thus, he has waived his right to present these claims on appeal. *See, United States v. LiraArredondo*, 38 F.3d 531, 533 n. 2 (10th Cir. 1994) (to preserve error, party generally must make timely objection stating specific grounds therefore).

18 U.S.C. § 1001. Count I of the respective indictments charged Wiles and Schleibaum under the second and third clauses of § 1001. The indictments alleged that both Defendants "did knowingly and willfully make and cause to be made false, fictitious and fraudulent statements and a false writing and document, that is, Miniscribe's Form 10-K Report for fiscal year 1987, submitted to the SEC."

While the second and third clauses of § 1001 do not expressly make materiality an element of the offense, we have held since 1960 that materiality is an element of any § 1001 offense. *Gonzales v. United States*, 286 F.2d 118 (10th Cir. 1960), *cert. denied*, 365 U.S. 878, 81 S.Ct. 1028, 6 L.Ed.2d 190 (1961).[6] Prior to *United States v. Daily*, 921 F.2d 994 (10th Cir. 1990), *cert. denied*, 502 U.S. 952, 112 S.Ct. 405, 116 L.Ed.2d 354 (1991), the government had the burden of proving to the jury the element of materiality beyond a reasonable doubt. In *Daily*, however, we overruled our prior precedent and held that materiality under § 1001 was a question of law for the court, "with an attendant reduction of the government's burden of proof on this issue." *Id.* at 1003 n. 9 & 1004. At the time of Wiles' and Schleibaum's respective trials, *Daily* was still the law of this circuit. Without objection, the district court concluded that

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[6]The Supreme Court has granted certiorari in *United States v. Wells*, 63 F.3d 745 (8th Cir. 1995), *cert. granted*, — U.S. —, 116 S.Ct. 1540, 134 L.Ed.2d 645 (1996), to decide whether materiality is an element of an offense under 18 U.S.C. § 1014. Section 1014 proscribes the making of "any false statement or report . . . for the purpose of influencing in any way" an FDIC insured institution. The materiality element of § 1014 is directly in issue in *United States v. Pappert*, No. 95-3071 (10th Cir., filed March 10, 1995), which was consolidated with these appeals for en banc argument on the materiality issue. Because § 1014 is similar but not identical to § 1001, the Supreme Court's discussion of materiality in Wells as an element of a § 1014 offense may, but will not necessarily, affect our determination that materiality is an element of any § 1001 offense.

materiality was a question of law consistent with binding precedent. The court also concluded, over Defendants' respective objections, that the government met its burden by producing "some evidence" of the false statements' materiality. The court did not indicate what evidentiary burden it applied in reaching this conclusion.

During the pendency of these appeals, the Supreme Court decided *United States v. Gaudin*, — U.S. —, 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995). The Court reasoned that a defendant has a right under the Fifth and Sixth Amendments, U.S. Const. amend. V & VI, to have a jury determine guilt beyond a reasonable doubt on every element of a charged offense. The Constitution "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at ____, 115 S.Ct. at 2313. Because materiality is an element of a § 1001 charge, the jury, not the court, must find materiality. *Id.* at ____, 115 S.Ct. at 2314.[7] Obviously, *Gaudin* overruled our prior precedent to the contrary. Wiles and Schleibaum now assert that the district court improperly decided materiality under § 1001 as a question of law in violation of their right to a jury trial. U.S. Const. amend. V & VI.

1.

The district court's failure to instruct the respective juries on materiality as an element of a § 1001 offense undoubtedly constitutes error under *Gaudin*. Unless a legal rule is waived, any deviation from the rule is error. *United States v. Olano*, 507 U.S. 725, 732-33, 113 S.Ct. 1770, 1776, 123

[7] In *Gaudin*, the Court did not address the issue of whether materiality is an element of any § 1001 offense. Rather, the parties agreed that materiality was an element of any false statements offense under § 1001. *Gaudin*, ____ U.S. at ____, 115 S.Ct. at 2313.

L.Ed.2d 508 (1993). Waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).[8] Wiles and Schleibaum did not intentionally relinquish or abandon their right to have a jury determine beyond a reasonable doubt all elements of the § 1001 charges. At the time of their trials, they were not aware of this right. *See* Fed.R.Crim.P. 51 ("if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party").

The district court's treatment of materiality as a question of law under § 1001 was quite consistent with the law prevailing at the time of trial. In *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), however, the Supreme Court established that "a new rule for the conduct of criminal persecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."[9] *Gaudin* sets forth a constitutional rule which requires the government in a § 1001 prosecution to prove materiality to the jury beyond a reasonable doubt.

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[8]Forfeiture, as opposed to waiver, is the failure to make the timely assertion of a right. *Olano*, 507 U.S. at 733, 113 S.Ct. at 1777.

[9]The only exception to this rule, inapplicable here, is where the retroactive application of a new rule for the conduct of criminal prosecutions would raise "due process concerns analogous to the ex post facto limitations on the retroactive application of criminal statutes." *United States v. Morehead*, 959 F.2d 1489, 1511 (10th Cir. 1992). The Ex Post Facto Clause protects criminal defendants against legislative enactments that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dept. of Corrections v. Morales*, ____ U.S. ____, ____, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995). The Due Process Clause of the Fifth and Fourteenth Amendments protects criminal defendants against analogous judicial action. Thus a court does not apply a newly announced judicial rule where the new rule either: (1) retroactively alters the definition of a crime; or (2) increases the punishment for an offense. *Id.*

Gaudin overrules the prior law of this circuit and places a higher burden of proof upon the government than previously when courts deemed materiality a question of law. *See Daily*, 921 F.2d at 1003 n. 9 & 1004. We therefore conclude that *Gaudin* must be applied retroactively in accordance with *Griffith*.

2.

Our next task is to determine the nature of the error, that is, the district court's failure to instruct the respective juries on materiality as an element of the § 1001 charge. In a direct criminal appeal, we generally review error committed in the district court under Fed.R.Crim.P. 52:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

According to the plain language of Rule 52, we must determine whether the error affected substantial rights under either harmless or plain error analysis. This means "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Olana*, 507 U.S. at 734, 113 S.Ct. at 1777. The inquiry is the same under either subsection (a) or (b) "with one important difference." *Id.* Where a defendant has posed a timely objection to the error, the government bears the burden of proving a lack of prejudice under Rule 52(a)'s harmless error analysis. Where a defendant has failed to pose a timely objection to the error, the defendant bears the burden of proving prejudice under Rule 52(b)'s plain error analysis.

Id. Under either approach, however, we must be able to determine whether the error affected a defendant's substantial rights in order to apply Rule 52. In other words, we must be able to evaluate the effect of the error on the reliability of the jury verdict. See *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). Trial error which occurs during presentation of the case to the jury may "be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307-08. 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991).

Although the rare exception, not every error in a criminal trial may be quantitatively assessed in the context of the other evidence, and thus, not every error requires a showing of prejudice or lack thereof. The Supreme Court has recognized a "special category" of errors which must be corrected regardless of their effect on the outcome of the case. *Olano*. 507 U.S. at 735, 113 S.Ct. at 1778. The Supreme Court has labeled this category of errors as "structural." *Fulminante*, 499 U.S. at 310, 111 S.Ct. at 1265. A structural error in a criminal trial always requires reversal of a conviction because such error renders the trial an unreliable vehicle for the determination of guilt. *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3105-06, 92 L.Ed.2d 460 (1986). Structural error constitutes a "defect[ ] in the constitution of the trial mechanism" which defies analysis under Fed.R.Crim.P. 52. *Fulminante*, 499 U.S. at 309, 111 S.Ct. at 1265. Structural error affects the "framework within which the trial proceeds, rather than simply .... the trial process itself." *Id.* at 310, 111 S.Ct. at 1265. Structural error creates "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282, 113 S.Ct. at 2083.

Wiles and Schleibaum suggest that the district court's failure to instruct the juries on the element of materiality falls within that "special category" of errors that does not require a showing of prejudice, but must be corrected regardless of their outcome on the case, that is, they argue, the error is "structural." Because of the importance of the issue and the widely differing views among our sister circuits, *see* notes 12 & 13 *infra*, we decide as an en banc court whether the district court's failure to instruct the respective juries on the element of materiality under 18 U.S.C. § 1001 constitutes structural error, and, if so, whether that error is reversible per se or subject to plain error analysis.

a.

A "strong presumption" exists that even constitutional violations may be "harmless." *Rose*, 478 U.S. at 579, 106 S.Ct. at 3106. The Court on numerous occasions has held constitutional errors harmless. *See Fulminante*, 499 U.S. at 306-07, 111 S.Ct. at 1263 (listing cases). Moreover, the Court has held in a number of decisions that constitutionally infirm jury instructions may be harmless. *See Yates v. Evatt*, 500 U.S. 391, 402, 111 S.Ct. 1884, 1892, 114 L.Ed.2d 432 (1991) (unconstitutional burden-shifting jury instruction); *Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (jury instruction containing erroneous mandatory presumption on element of intent); *Pope v. Illinois*, 481 U.S. 497, 502-04, 107 S.Ct. 1918, 1921-23, 95 L.Ed.2d 439 (1987) (jury instruction misstating element of the offense); *Rose*, 478 U.S. at 581-82, 106 S.Ct. at 3107-08 (jury instruction containing erroneous rebuttable presumption on element of malice).

The general rule that constitutional error may be harmless, however, is subject to the exception for structural error. The Supreme Court has held that some constitutional viola-

tions are not susceptible to harmless error analysis under Fed.R.Crim.P. 52(a) because they are "structural" and thus presumed prejudicial. Structural errors "affect[ ] the framework within which the trial proceeds" and render the trial fundamentally unfair. *Fulminante*, 499 U.S. at 310, 111 S.Ct. at 1265. Without certain basic or "structural" protections, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-78, 106 S.Ct. at 3106. Examples of structural errors are exclusion of individuals from a grand jury based on race, *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), denial of the right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8, 104 S.Ct. 944, 950 n.8, 79 L.Ed.2d 122 (1984), denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n. 9, 104 S.Ct. 2210, 2217 n.9, 81 L.Ed.2d 31 (1984) a petit jury's improper selection, and exposure to pretrial publicity, *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), denial of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), and potentially biased judges, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

In *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Supreme Court unanimously held that a constitutionally-deficient reasonable doubt instruction was structural. The Court reasoned that "where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings," no jury verdict of beyond-a-reasonable-doubt exists upon which to base a harmless error analysis. *Id.* at 281, 113 S.Ct. at 2082 (emphasis in original). The Court continued:

> There being no jury verdict of guilty-beyond-a-reasonable doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt — not that that jury's actual finding of guilt beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual finding of guilty.

Id. at 280, 113 S.Ct. at 2082 (emphasis in original) (citations omitted). The Court concluded: "The deprivation of that right [to be found guilty beyond a reasonable doubt of every element of an offense], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.* at 281-82, 113 S.Ct. at 2083.

b.

As a matter of historical development, the concept of structural error arose in cases where criminal defendants objected at trial to a specific error, and thus, the courts examined the error under the harmless error doctrine. The reason why structural error defies harmless error analysis under Fed.R.Crim.P. 52(a), however, is the same reason why structural error defies plain error analysis under Rule 52(b). The Supreme Court has expressly stated that structural error at trial *requires reversal.* In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court "recognized that some constitu-

tional errors *require reversal without regard to the evidence in the particular case.*" *Rose*, 478 U.S. at 577, 106 S.Ct. at 3105 (emphasis added) (citing *Chapman*, 386 U.S. at 23 n. 8, 87 S.Ct. at 828 n. 8). Similarly, in *Sullivan*, 508 U.S. at 279, 113 S.Ct. at 2081, the Court noted that some constitutional errors "will *always* invalidate the conviction." (emphasis added). A defendant "may assuredly insist upon observance of . . . [structural] guarantee[s] even when the evidence against him is so overwhelming to establish guilt beyond a reasonable doubt." *Carella*, 491 U.S. at 268, 109 S.Ct. at 2422 (Scalia, J. concurring). *E.g., Vasquez*, 474 U.S. at 263, 106 S.Ct. at 623 (when judge has financial interest in conviction, "reversal required" despite any showing of actual bias, citing *Tuney*, 273 U.S. at 535, 47 S.Ct. at 445); *Id.* (when petit jury selected upon improper criteria or exposed to prejudicial publicity, Court has "required reversal," citing *Sheppard*, 384 U.S. at 351-52, 86 S.Ct. at 1516); *Holloway*, 435 U.S. at 489, 98 S.Ct. at 1181 (when defendant is deprived of counsel "reversal is automatic," citing *Gideon*, 372 U.S. 335, 83 S.Ct. 792). Reversal is required because structural error is a "fundamental flaw[ ]" in the trial process and *"undermines the structural integrity of the criminal tribunal itself." Vasquez*, 474 U.S. at 263-64, 106 S.Ct. at 623 (emphasis added). Due to the nature of structural error, whether a defendant objects (as required for Rule 52(a) analysis) or fails to object (as required for Rule 52(b) analysis) to such error at trial is simply irrelevant.

In his Gaudin concurrence, Chief Justice Rehnquist noted that the government did not argue, and the Court did not address, the application of Rule 52 to the trial court's failure to instruct the jury on materiality under 18 U.S.C. § 1001. *Gaudin*, ____ U.S. at ____, 115 S.Ct. at 2321 (Rehnquist, C.J., concurring). The central question in the present appeals, unaddressed in *Gaudin*, is into which category the district court's failure to instruct on the element of

materiality belongs: Is the error non-structural and subject to analysis under Fed.R.Crim.P. 52, or is the error structural and presumed to render Defendants' convictions under 18 U.S.C. § 1001 fundamentally unfair absent a showing of prejudice? We believe Supreme Court precedent requires us to conclude that the district court's failure to instruct the respective juries on the element of materiality is structural and requires us to vacate Defendant's § 1001 convictions.[10]

c.

The Fifth Amendment requires the federal government to prove beyond a reasonable doubt that a defendant is guilty of every contested element of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

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[10] A situation may arise when a reviewing court may conclude with complete confidence that a failure to instruct on an element of an offense did not play a role in the jury's verdict on that offense. This is exactly what we concluded recently in *United States v. Mason*, 85 F.3d 471 (10th Cir. 1996), wherein we stated:

> When the only evidence *tends* to establish an elemental fact, or when the parties stipulate to evidence *tending* to establish an elemental fact, the jury must still resolve the existence or nonexistence of the fact sought to be proved. In contrast, the jury need not resolve the existence of an element when the parties have stipulated to the facts which establish that element. In the latter circumstance, the judge has not removed the consideration of an issue from the jury; the parties have. More specifically, by stipulating to elemental facts, a defendant waives his right to a jury trial on that element.

Id. at 472 (emphasis added). Thus, where a defendant at trial stipulates to facts establishing the element and effectively takes consideration of that element from the jury, a court might properly conclude that no error occurred from the failure to instruct. *See Connecticut v. Johnson*, 460 U.S. 73, 87, 103 S.Ct. 969, 977-78, 74 L.Ed.2d 823 (1983) (plurality opinion) (failure to properly instruct jury on an element of an offense may be harmless where defendant conceded existence of element). Because both Wiles and Schleibaum contested the element of materiality at their respective trials, we are not confronted with that situation.

The Sixth Amendment requires "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilty." *Sullivan*, 508 U.S. at 277, 113 S.Ct. at 2080. Together, these rights mean that a criminal conviction must rest on a jury determination that the accused "is guilty of every element of the crime with which he is charged beyond a reasonable doubt." *Gaudin*, ____ U.S. at ____, 115 S.Ct. at 2313. The Supreme Court's statement in *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), regarding a trial court's failure to instruct the jury on an element of a crime, follows directly from this analysis:

> A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence. . . . *Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the offense.*

Id. at 384-85, 106 S.Ct. at 696 (emphasis added).

To affirm Defendants' convictions under 18 U.S.C. § 1001 where the contested element of materiality was not submitted to the juries not only would deny Defendants important constitutional guarantees, but also would require us in undertaking harmless or plain error analysis to "engage in pure speculation — [our] view of what a reasonable jury would have done." *Sullivan*, 508 U.S. at 281, 113 S.Ct. at 2082. But if we did that, " 'the wrong entity [would] judge the defendant[s] guilty.' " *Id.* (quoting *Rose*, 478 U.S. at 578, 106 S.Ct. at 3106). The Defendants' right to a jury trial with the accompanying right to be found guilty beyond a reasonable doubt of every element of § 1001 is a "structural guarantee" that —

> "reflect[s] a fundamental decision about the exercise of official power — reluctance to entrust plenary powers over

> the life and liberty of the citizen to one judge or to a group of judges." *A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt.*

Carella, 491 U.S. at 268, 109 S.Ct. at 2422 (Scalia, J., concurring) (emphasis added). In other words, " 'the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.' " *Id.* at 269, 109 S.Ct. at 2422 (quoting *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946)).

These appeals present a problem unlike those cases where the trial court instructs a jury to presume an element of the offense from underlying predicate facts. In those instances, the error may be harmless. *E.g., Rose*, 478 U.S. at 580-81, 106 S.Ct. at 3107-08. The question is whether the jury based its verdict on evidence establishing the presumed element beyond a reasonable doubt, independent of the presumption. *Yates*, 500 U.S. at 404, 111 S.Ct. at 1893. The predicate facts may conclusively establish the existence of the element to be presumed so that no rational jury could find the predicate facts without also finding the presence of the element. *See Pope*, 481 U.S. at 502-503, 107 S.Ct. at 1922. Such a presumption then may play no significant role in the jury's findings. *Sullivan*, 508 U.S. at 281, 113 S.Ct. at 2082. A Rule 52 standard that looks at the question of whether the jury necessarily found the element to be satisfied based; upon underlying findings of fact, rather than what a hypothetical jury might have found, places the determination of the element in the "right entity" — the jury. In other words, if the element-specific error did not prevent the jury from rendering a verdict on that element, an "object" remains upon which harmless or plain error scrutiny can operate, and

thus the error is not structural. *See Sullivan*, 508 U.S. at 280, 113 S.Ct. at 2082.

But the essential connection between a presumption and underlying predicate facts is not present where the error consists of the failure to instruct on an element of a crime in its entirety. *See id.* When an instructional error affects a single element, the proper "object" of focus is the jury's verdict on that element. If, as here, the element-specific error, *i.e.*, the instructional omission, prevents the jury from rendering a verdict on an element entirely, no "object" exists upon which harmless or plain error analysis can operate. To conclude the error was harmless or not plain would be the same as directing a verdict on the element — both would prevent an actual jury verdict on that element. Supreme Court precedent precludes us from "conduct[ing] a subjective inquiry into the juror's minds" in order to uphold a conviction. *Yates*, 500 U.S. at 404, 111 S.Ct. at 1893; *see also Sullivan*, 508 U.S. at 278-81, 113 S.Ct. at 2080-83, *Yates*, 500 U.S. at 402-06, 111 S.Ct. at 1892-94; *Rose*, 478 U.S. at 576-79, 106 S.Ct. at 3105-07.[11]

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[11] We are not confronted with a situation where a failure to instruct on an element of a crime as to one count of the indictment might taint convictions on remaining counts. *See United States v. Pettigrew*, 77 F.3d 1500, 1511-12 (5th Cir. 1996) (failure to instruct on substantive count necessarily tainted instructions on conspiracy count); *United States v. Nash*, 76 F.3d 282, 285-86 (9th Cir. 1996) (failure to instruct on false statements charge necessarily tainted instructions on bank fraud charge); *United States v. Johnson*, 71 F.3d 139, 145-46 (4th Circ. 1995) (erroneous instruction in first count incorporated by reference into second count necessarily tainted convictions on both counts). Each count of the respective indictments against Wiles and Schleibaum charged them with separate and distinct substantive crimes. The district court's failure to instruct on the element of materiality under § 1001 had no bearing upon the instructions which the court entered on the remaining counts. *Cf. United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996) (conviction on mail fraud charge which required jury

The Supreme Court very recently shed further light on the proper manner in which to analyze structural error. In *California v. Roy*, ____ U.S. ____, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996), a California state court instructed a jury that in order to find the defendant guilty of robbery and murder as an aider and abettor, the jury must find the defendant helped the principal "with knowledge of" the principal's unlawful purpose. The California Supreme Court subsequently held in another case that the instruction was error because it failed to include the requirement that defendant intended to encourage or facilitate the crimes. On collateral review, the Supreme Court noted:

> The specific error at issue here — an error in the instruction that defined the crime — is . . . as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.' No one claims that the error at issue here is of the 'structural sort' that defies analysis by 'harmless error' standards.

Id. at ____, 117 S.Ct. at 339 (internal citations and quotations omitted). The Court remanded for a determination of whether the error could be considered harmless under the standard established in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), namely, whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Roy*, ____ U.S. at ____, 117 S.Ct. at 338 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993)).

Justice Scalia joined the Court's opinion but wrote separately to explain "what constitutes the harmlessness to which ... [the] standard is applied." *Roy*, ____ U.S. at ____, 117 S.Ct. at 339 (Scalia, J., concurring). Relying upon *Sullivan*, 508 U.S. at 279-80, 113 S.Ct. at 2082, and

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to find element of materiality sufficient to satisfy court that jury would have found same statements material on § 1001 charge).

Gaudin, ____ U.S. at ____-____, 115 S.Ct. at 2319-20, Justice Scalia explained:

> [A] criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed no matter how inescapable the findings to support that verdict might be. A jury verdict that he is guilty of the crime means, of course, a verdict that he is guilty of each necessary element of the crime. . . .
>
> The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well.

Roy, ____ U.S. at ____-____, 117 S.Ct. at 339-40 (Scalia, J., concurring) (internal citations and quotations omitted).

Thus, the structural error is not limited to situations where a constitutional error affects "the entire conduct of the trial from beginning to end" *Fulminante*, 499 U.S. at 309-10, 111 S.Ct. at 1265. Rather, structural error can exist where a constitutional error affects a single element and causes the absence of a verdict on that element. *See Roy*, ____ U.S. at ____-____, 117 S.Ct. at 339-40 (Scalia, J. concurring). Because the respective juries in the cases before us did not render a verdict, formal or otherwise, against Wiles or Schleibaum on the element of materiality, we hold that the district court's failure to instruct the juries as to the element of materiality under 18 U.S.C. § 1001 on Count I of the respective indictments is "structural" error and falls within that "special category of forfeited errors" that does not require a showing of prejudice, but rather, *must be* corrected.[12] *Olano*, 507 U.S. at 735, 113 S.Ct. at

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[12]To assist in our analysis, we reviewed recent circuit decisions where the district court failed to instruct on a matter that the Supreme Court subsequently held was a factual element of the charged offense. *United*

1778. Because the error is structural, and thus not amenable

States v. Baumgardner, 85 F.3d 1305, 1309-10 (8th Cir. 1996); *United States v. DiRico*, 78 F.3d 732, 736-38 (1st Cir. 1996); and *United States v. Gaudin*, 28 F.3d 943, 951-52 (9th Cir. 1994) (en banc), *aff'd*, ____ U.S. ____, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), have held that a failure to instruct on an element of an offense requires reversal. But *see United States v. Keys*, 95 F.3d 874, 880-81 (9th Cir. 1996) (en banc) (*Gaudin* error subject to harmless error review but reversal always required); *United States v. Raether*, 82 F.3d 192, 194 (8th Cir. 1996) (*Gaudin* error subject to harmless error review and reversal not always required). The majority of the decisions, however, engage, in differing degrees, in an analysis of the trial record to determine the existence of prejudice, with varying results. *E.g., United States v. Marder*, 48 F.3d 564, 569-71 (1st Cir.), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1441, 131 L.Ed.2d 320 (1995) (failure to instruct on element of knowledge of unlawfulness on currency structuring offense not prejudicial); *Ianniello v. United States*, 10 F.3d 59, 62-65 (2d Cir. 1993) (failure to instruct on requirement of relationship among predicate acts under RICO not prejudicial); *United States v. Retos*, 25 F.3d 1220, 1228-32 (3d Cir. 1994) (failure to instruct on element of knowledge of unlawfulness on currency structuring offense prejudicial, but expressly declining to adopt per se rule that omission of essential element of offense constitutes plain error; (*United States v. David*, 83 F.3d 638, 641-48 (4th Cir. 1996) (failure to instruct on element of materiality on false statements charge prejudicial, but expressly declining to adopt per se rule that omission of essential element of offense constitutes plain error); *United States v. Rogers*, 18 F.3d 265, 267-68 (4th Cir. 1994) (failure to instruct on element of knowledge of unlawfulness on currency structuring offense constitutes plain error, but not expressly labeling error as structural); *United States v. McGuire*, 79 F.3d 1396, 1400-05 (5th Cir.) (plurality) (failure to instruct on element of materiality on filing false IRS cash receipt form charge prejudicial), *reh'g en banc* granted 90 F.3d 107 (5th Cir. 1996); *United States v. Parker*, 73 F.3d 48, 50-53 (5th Cir. 1996) (failure to instruct on requirement of interstate nexus under Hobbs Act not prejudicial); *United States v. McGhee*, 87 F.3d 184, 185-88 (6th Cir.) (failure to instruct on element of materiality on false statement charge not prejudicial), *vacated and reh'g en banc* granted 95 F.3d 1335, (6th Cir. 1996); *United States v. Jones*, 21 F.3d 165, 172-73 (7th Cir. 1994) (failure to instruct on element of knowledge of unlawfulness on currency structuring offense prejudicial; "no evidence" on element presented); *United States v. Kramer*, 73 F.3d 1067, 1074-75

to analysis under Fed.R.Crim.P. 52, or the discretion we possess thereunder, we vacate Defendants' § 1001 convictions under Count I of the respective indictments.[13]

B.

Wiles and Schleibaum also assert that the securities fraud charge contained in count two of the respective indictments against them was prejudicially duplicitous. According to Defendants, the juries may have found them guilty of securities fraud without having reached a unanimous verdict on the commission of a particular offense or act of securities fraud. The district court rejected Defendants' arguments. The court reasoned that a unanimity instruction would alleviate any possible jury confusion and ensure unanimous verdicts. We review de novo the question whether an indictment is duplicitous. *United States v. Martin*, 4 F.3d 757, 759 (9th Cir. 1993). We conclude that count two of the respective indictments was not duplicitous and

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(11th Cir. 1996) (failure to instruct on element of materiality on perjury charge not prejudicial).

[13] We disagree with those decisions which have labeled the failure to instruct the jury on an element of an offense as structural and presumed such failure to be prejudicial, but then proceeded to uphold the defendant's conviction under the fourth prong of the plain error analysis. *E.g., United States v. Upton*, 91 F.3d 677, 685-86 (5th Cir. 1996); *United States v. Jobe*, 90 F.3d 920, 923,24 (5th Cir. 1996); *United States v. Randazzo*, 80 F.3d 623, 632 (1st Cir. 1996); *United States v. Ross*, 77 F.3d 1525, 1540 (7th Cir. 1996); *United States v. Allen*, 76 F.3d 1348, 1368 (5th Cir.), *cert. denied*, ____ U.S. ____ , 117 S.Ct. 121, 136 L.Ed.2d 71 (1996). These decisions reason that where the evidence of a defendant's guilt is overwhelming, the defendant suffered no prejudice, and thus the failure to instruct did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." As we have seen, however, structural error requires reversal in every instance because such error "undermines the structural integrity of the criminal tribunal itself." *Vasquez*, 474 U.S. at 263-64, 106 S.Ct. at 623.

that the unanimity instructions cured any prejudice to the Defendants.

Duplicity is defined as the joinder of two or more distinct and separate criminal offenses in the same count of an indictment. *United States v. Haddock*, 956 F.2d 1534, 1546 (10th Cir.), *reh'g* in part, 961 F.2d 933 (10th Circ.), *cert. denied*, 506 U.S. 828, 113 S.Ct. 88, 121 L.Ed.2d 50 (1992). The dangers of duplicity are three-fold: (1) A jury may convict a defendant without unanimously agreeing on the same offense; (2) A defendant may be prejudiced in a subsequent double jeopardy defense; and (3) A court may have difficulty determining the admissibility of evidence. *United States v. Sasser*, 971 F.2d 470, 477 n.5 (10th Cir. 1992), *cert. denied*, 507 U.S. 924, 113 S.Ct. 1292, 122 L.Ed.2d 683 (1993). An indictment that alleges several means or methods of committing a single offense, rather than several separate offenses, however, is not necessarily duplicitous. *United States v. Jaynes*, 75 F.3d 1493, 1502 n.7 (10th Cir. 1996); *United States v. Browning, Inc.*, 572 F.2d 720, 725 (10th Cir.), *cert. denied*, 439 U.S. 822, 99 S.Ct. 88, 58 L.Ed.2d 114 (1978).

In these cases, count two alleged that as part of the fraudulent scheme, Wiles and Schleibaum filed false reports with the SEC. The second count charged each Defendant with multiple fraudulent sales of Miniscribe stock. Additionally, count two of the indictment against Wiles charged him with issuing numerous false mailings and press releases. Count two of the indictments was necessarily complex because the fraudulent scheme in which Defendants participated was complex, extending over the course of two years.

But charging a single offense of securities fraud involving a multitude of ways and courses of action as a result of an

ongoing scheme to defraud does not render that charge duplicitous. Fed.R.Crim.P. 7(c) permits the government to allege in a single count that the defendant committed an offense "by one or more specified means." *United States v. McKneely*, 69 F.3d 1067, 1072 (10th Cir. 1995). We draw a distinction between an indictment that charges multiple offenses for distinct and separate criminal acts in the same count, and an indictment that charges multiple means of carrying out one offense associated with a continuing course of criminal conduct. *Browning*, 572 F.2d at 725. As we stated in *United States v. Crummer*, 151 F.2d 958, 964 (10th Cir. 1945), *cert. denied*, 327 U.S. 785, 66 S.Ct. 704, 90 L.Ed. 1012 (1946), a case involving a mail fraud scheme in which defendants unsuccessfully claimed the indictment was duplicitous:

> The scheme, as laid in the indictment, involved a multiplicity of ways and means of action and procedure, but it was a single scheme. And setting out the numerous ways and means of action and procedure included in the scheme for its accomplishment did not render the indictment duplicitous.

Because of the complexity of the scheme and the concern over nonunanimous verdicts, the court nevertheless tendered a unanimity instruction to the respective juries as part of their instructions on count two. The court instructed each jury that although individual jurors need not agree on all the means or methods by which Defendants committed securities fraud, they must unanimously agree upon at least one such means or method to convict Defendants of securities fraud.[14] In this circuit, such an instruction "suffices to instruct the jury that they must be unanimous on whatever

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[14]The district court submitted the following unanimity instruction on count two to the jury at Wiles' trial:

> Count 2 of the indictment charges the Defendant Wiles with a violation of federal law concerning securities fraud. The indictment

specifications they find to be the predicate of the guilty verdict." *Sasser*, 971 F.2d at 477 (quoting *United States v. Phillips*, 869 F.2d 1361, 1366 (10th Cir. 1988), *cert. denied*, 490 U.S. 1069, 109 S.Ct. 2074, 104 L.Ed.2d 638 (1989)).

Wiles makes much ado over a question which the jury submitted to the court during deliberations. The question read: "Can you clarify the portion of your instruction to [the] jury regarding the requirement that we agree unanimously on one of many individual charges in each count of the indictment." Aplts. App. Vol I at 131. Wiles suggests that the jury's question illustrates that the jury did not understand the court's unanimity instruction and that the risk of a non-unanimous verdict against him was significant and prejudicial. Wiles' speculation is insufficient to cast doubt upon the jury's verdict.

The court responded to the jury in detail, again stressing the requirement of unanimity for conviction.[15] We must

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alleged a number of separate means or methods by which the defendant is accused of violating this law.

The government is not required to prove all of the means or methods alleged in Count 2 of the indictment, but each juror must agree with each of the other jurors, however, that the same means or method alleged in Count 2 was, in fact, engaged in or employed by the defendant in committing the crime charged in Count 2 of the indictment. The jury need not unanimously agree on each means or method, but, in order to convict, must unanimously agree upon at least one such means or method as one engaged in by the defendant. Unless the government has proven the same means or method to each of you, beyond a reasonable doubt, you must acquit the defendant of the crime charged in count 2 of the indictment.

Aplts.App. Vol. XII at 3354-56. The district court gave this same instruction to the jury at Schleibaum's trial. Aplts. App. at 333-35.

[15] The court stated to the jury:

In Count 2, the government alleged that in connection with the purchases and sales of Miniscribe stock, the defendant, Q.T. Wiles, with knowledge concerning Miniscribe's inflated inventory, income before taxes and net income, all resulting from illicit efforts to conceal

presume that the jurors remained loyal to their oaths and conscientiously followed the district court's instructions. *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n. 9, 85 L.Ed.2d 344 (1985). This assumption is fundamental to our system of justice. *United States v. Lonedog*, 929 F.2d 568, 576 (10th Cir.), *cert. denied*, 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 129 (1991). A defendant who urges us "to find jurors unwilling, unable, or incapable of following a trial court's instructions bear a heavy burden of persuasion." *United States v. Carter*, 973 F.2d 1509, 1514 (10th Cir. 1992), *cert. denied*, 507 U.S. 922, 113 S.Ct. 1289, 122 L.Ed.2d 681 (1993). Wiles has not met this burden.

C.

Wiles contends the government presented insufficient evidence of his knowledge of the fraudulent scheme to sustain the jury's verdicts against him. The district court summarily rejected this argument. While a challenge to the sufficiency of the evidence presents a question of law subject to de novo review, *United States v. Markum*, 4 F.3d 891, 893

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an inventory shortfall, one, employed a device, scheme or artifice to defraud. This refers to the scheme to conceal an inventory shortage. Or, two, made untrue statements of material facts or made material omissions of fact causing statements made to be misleading. This refers to false statements in the annual reports. Or, three, engaged in a fraud and deceit upon Miniscribe shareholders and unwitting purchasers and sellers of stock. This refers to insider trading, that is, using insider information on the sale of his stock.

The government need not prove all three of these means or methods of committing the crime of securities fraud. It is necessary, however, before there can be a conviction on this count, that the jury must unanimously agree that at least one of these means or methods has been proven beyond a reasonable doubt, and all jurors must agree on the same means or method.

Aplts.App. Vol. XII at 3398.

(10th Cir.1993), well established principles govern that review.

In addressing a sufficiency of the evidence argument, we examine all the evidence in a light most favorable to the government and ask whether that evidence, together with all reasonable inferences to be drawn therefrom, can support a finding of guilt beyond a reasonable doubt. *United States v. Wacker*, 72 F.3d 1453, 1462 (10th Cir.1995), *cert. denied*, ____ U.S. ____, 117 S.Ct. 136, 136 L.Ed.2d 84 (1996). "While the evidence supporting the conviction must be substantial and do more than raise a mere suspicion of guilt, it need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities except guilt." *United States v. Johnson*, 42 F.3d 1312, 1319 (10th Cir.1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1439, 131 L.Ed.2d 318 (1995) (internal quotations omitted). We will overturn a guilty verdict only if *no* rational trier of fact could have found the contested elements of the crime beyond a reasonable doubt. *United States v. Owens*, 70 F.3d 1118, 1126 (10th Cir.1995).

Wiles' sufficiency argument need not detain us long. To be sure, Wiles denied any knowledge of any wrongdoing at Miniscribe during the course of the cover-up. And the jury could have believed him had it so chosen; but the jury chose not to believe him. Instead, the jury chose to believe the myriad of government witnesses who by their testimony, and the reasonable inferences to be drawn therefrom, implicated Wiles as a key player in the scheme.

We have carefully reviewed the voluminous trial record and have no quarrel with the jury's finding that Wiles knew quite well of the cover-up, and acted to further its illicit purposes and ultimate aims. The testimony of other key players in the scheme, namely Owen Taranta, Jesse Parker, Kenneth Huff, Warren Perry, Gerald Goodman, and William Lorea, as well as the testimony of Miniscribe employ-

ees Marta Van Der Schouw, Gene Dehner, Kelly Hicks, and Hannah Bolster-Valadez, is sufficient to sustain the jury's finding that Wiles knew of the fraudulent scheme. " 'To the extent the evidence conflict[ed], we [are required to] accept the jury's resolution of conflicting evidence and its assessment of the credibility of witnesses.' " *Owens*, 70 F.3d at 1126 (quoting *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir.1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 796, 133 L.Ed.2d 744 (1996)).

D.

Relying on *Travis v. United States*, 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961), Wiles next asserts that venue on the false statements charge under 18 U.S.C. § 1001 was improper in the District of Colorado. Count one specifically charged Wiles with causing Miniscribe to make a false 1987 10-K report, which was filed with the SEC in Washington, D.C. Wiles argues that the District of Columbia was the only proper venue. The district court disagreed, concluding venue was proper in the District of Colorado.

Venue in federal criminal prosecutions is a question of fact which the government must prove. *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir.1981), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982). Unlike the elements of the substantive crime, however, the government must prove venue only by a preponderance of the evidence. *Id.*

In reviewing a challenge to venue, we view the evidence in a light most favorable to the government and ask whether the government proved by a preponderance of the evidence, direct or circumstantial, that the crime charged occurred within the district of prosecution. *United States v. Rinke*, 778 F.2d 581, 584 (10th Cir.1985). Applying this standard, we agree with the district court that venue on the § 1001 charge was proper in the District of Colorado.

We begin with U.S. Const. art. III, § 2, which provides that the "trial of all crimes . . . shall be held in the state where the said crimes shall have been committed." This requirement is reiterated in the Sixth Amendment and codified in Fed.R.Crim.P. 18, which provides that criminal prosecutions "shall be had *in a district* in which the offense was committed." (emphasis added). Rule 18 recognizes that criminal acts may extend beyond the borders of a single district. Congress addressed the issue of venue in multidistrict crimes in 18 U.S.C. § 3237(a):

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Because § 1001 does not contain an express venue provision, we rely on § 3237(a). *See United States v. Ryan*, 894 F.2d 355, 360 (1990).

In *Travis*, the government charged the defendant with violating 18 U.S.C. § 1001. The Supreme Court addressed the issue of venue under 18 U.S.C. § 3237(a). The defendant, a union officer, filed false nonCommunist affidavits with the National Labor Relations Board (NLRB) in Washington, D.C. The defendant made and executed the affidavits in Colorado. The Court held that venue was improper in the District of Colorado. "Where Congress is not explicit, 'the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *Travis*, 364 U.S. at 635,-81 S.Ct. at 361 (quoting *United States v. Anderson*, 328 U.S. 699, 703, 66 S.Ct. 1213, 1216, 90 L.Ed. 1529 (1946)).

Unlike the SEC rules and regulations which bound Wiles, however, the applicable law in *Travis* did *not* require the

filing of any statement with the government. Rather, the filing of the non-Communist affidavits was voluntary, but a condition precedent to the union invoking the investigatory powers of the NLRB. The Court stated: "[T]he National Labor Relations Act, with which we are concerned, did not require union officers to file non-Communist affidavits. If it had, the whole process of filing ... might logically be construed to constitute the offense." *Travis*, 364 U.S. at 635, 81 S.Ct. at 361.

Section 1001 specifically proscribes the *making* of false statements to the government. In Wiles' case, the law required Miniscribe to make a 1987 10-K Report and file it with the SEC. 15 U.S.C. § 78m(a); 17 C.F.R. §§ 240.13a-1, 249.310. A knowing or willful failure to make and file the required 10-K Report is a crime. 15 U.S.C. § 78ff. Thus, we conclude that "the whole process of filing ... constitute[s] the offense" in this instance. *Id.* This includes the District of Colorado where the false 10-K was made. *See United States v. Zwego*, 657 F.2d 248, 251 (10th Cir.1981), *cert. denied*, 455 U.S. 919, 102 S.Ct. 1275, 71 L.Ed.2d 460 (1982) (in prosecution for making false statements to federally insured bank, venue is proper where statements were "prepared, executed, or made," or received by bank).

E.

Wiles finally asserts that the district court improperly admitted hearsay testimony on count three's wire fraud charge under 18 U.S.C. § 1343. Count three alleged Wiles' participated in a scheme designed to defraud Standard Chartered Bank (SCB) into lending Miniscribe monies. Wiles does not challenge the admission of any particular statement by any particular witness on count three. Rather, Wiles claims that the government's evidence did not establish that his involvement with SCB on behalf of Miniscribe

was part of any fraudulent scheme. Thus, according to Wiles, any hearsay testimony as to Wiles' negotiations with SCB and Miniscribe's resulting loan agreement with SCB was inadmissible. We disagree.

At the close of the government's case-in-chief, the court concluded that the government had established a common fraudulent scheme among Miniscribe's management, and that Wiles participated in that scheme from October 14, 1987 through February 1989. The court ruled that under Fed.R.Evid. 801(d)(2)(E), hearsay testimony of the scheme's participants was admissible on all counts of the indictment against Wiles.[16] We review the district court's decision to admit testimony under the hearsay exception of Rule 801(d)(2)(E) for an abuse of discretion. *United States v. Olivo*, 69 F.3d 1057, 1066 (10th Cir.1995), *on reh'g*, 80 F.3d 1466 (10th Cir.), *cert. denied*, ____ U.S. ____, 117 S.Ct. 265, 136 L.Ed.2d 189 (1996).

Rule 801(d)(2)(E) excepts from the definition of hearsay "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy," where the statement is offered against the party. Fed.R.Evid. 801(d)(2)(E). The party need not be charged with conspiracy. The rule applies where the evidence shows two or

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[16]The district court stated:

> [W]ith respect to the admissibility . . . under 801(d)(2)(E) of the statements by co-conspirators that are therefore not hearsay, I'm finding that by a preponderance of the evidence that ... the Government has proved the defendant began participation in the conspiracy . . . at the October 14, 1987 meeting. And, that it continued . . . through the dates of the charges in the indictment here which goes to February of 1989. It's actually March of 1989 in the indictment . . . but I find that it continued through February of 1989. And that among the participants were all those who were present at the October 14, 1987 meeting and, of course, a number of other persons.

Aplts.App. Vol. X at 2714.

more individuals acting in concert despite the absence of a conspiracy charge. *United States v. Durland*, 575 F.2d 1306, 1308 (10th Cir.1978).

[41] The evidence against Wiles plainly established that he acted in concert with other members of Miniscribe's management team in concealing the inventory hole beginning at management's quarterly meeting on October 14, 1987. The evidence further supports the district court's finding that Wiles' participation continued through February 1989 when he resigned. Wiles' argument that defrauding SCB was not a consideration in the decision to conceal the inventory hole is misplaced. We stated in *United States v. Russell*, 963 F.2d 1320, 1322 (10th Cir.), *cert. denied*, 506 U.S. 898, 113 S.Ct. 280, 121 L.Ed.2d 207 (1992):

> [C]onspirators are responsible for crimes committed "within the scope of the unlawful project" and thus "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." ... [A] conspiracy, once instituted, continues to exist until it is abandoned, succeeds, or is otherwise terminated by some affirmative act, such as withdrawal by the defendant.

(quoting *Pinkerton v. United States*, 328 U.S. 640, 647-48, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946)).

The fraud Wiles perpetrated on SCB was a foreseeable and natural consequence of the scheme to conceal the inventory hole and falsity Miniscribe's financial statements. Large businesses naturally look to banks to supply working capital through lending agreements. Miniscribe was no different. Banks in turn naturally rely on the financial statements of the business and the representations of its management to determine the nature and extent of the loan. SCB was no different. At the time of SCB's loan agreement with Miniscribe, Wiles' participation in the fraudulent scheme was ongoing. The district court did not abuse its

discretion in concluding that hearsay testimony offered against Wiles was admissible under Fed.R.Evid. 801(d)(2)(E) to prove the wire fraud charges against him.

F.

Lastly, Schleibaum argues that making false statements to the SEC cannot serve as the basis for his conviction under 18 U.S.C. § 1001. Schleibaum asserts that Congress intended the government to prosecute the making of false statements to the SEC under 15 U.S.C. § 78ff alone. The district court rejected Schleibaum's argument. We review the district court's interpretation of a criminal statute do novo, *United States v. Rothhammer*, 64 F.3d 554, 557 (10th Cir.1995), and also reject Schleibaum's argument.

The general prohibition against making false statements to the government is contained in the United States Criminal Code at 18 U.S.C. § 1001. A specific prohibition against making false statements to the SEC is contained in the Securities Exchange Act of 1934 at 15 U.S.C § 78ff. Section 78ff provides:

> [A]ny person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both . . . .

15 U.S.C. § 78ff. Congress passed the Securities Exchange Act of 1934 shortly before passing the general prohibition against making false statements to the government. Unlike § 1001, materiality is an express element of making a false statement under § 78ff.

The only decision to address Schleibaum's argument is *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir.), *cert.*

denied, 502 U.S. 813, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991). Using general principles of statutory construction, a divided panel of the Second Circuit held that nothing in the legislative history of either § 78ff or § 1001 indicated that the latter could not be used to charge the making of false statements to the SEC. The court noted the general rule that criminal statutes may overlap: "'[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.'" *Id.* at 1300 (quoting *United States v. Batchelder*, 442 U.S. 114, 123-24, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979)). The legislative history did not indicate whether Congress sought to restrict prosecutions under § 1001 by enacting § 78ff, and the proximity of the laws' enactments did not persuade the court that Congress intended such a result.

The dissent, upon which Schleibaum relies, noted that in the Second Circuit materiality under the second and third clauses of § 1001 was not an element of the offense. E.g., *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43 (1984), *overruled by United States v. Ali*, 68 F.3d 1468, 1474-75 (2d Cir.1995) (materiality is an element of any § 1001 offense), *on reh'g*, 86 F.3d 275 (2d Cir.1996). The dissent reasoned that the court's holding made the materiality element of § 78ff superfluous. *Bilzerian*, 926 F.2d at 1305 (Winter, J., dissenting). The dissent concluded that the government should not be permitted to charge a defendant under § 1001 and obtain a conviction for conduct proscribed by § 78ff without having to prove materiality because Congress could not have intended such a result. *Id.*

We do not share the dissent's concern. As we previously noted, in the Tenth Circuit materiality has long been an element of any false statements offense under § 1001. *Gonzales*, 286 F.2d at 120. The government must prove a false

statement's materiality under both § 78f and § 1001. Thus, permitting the government to charge the making of false statements to the SEC under § 1001 does not render the materiality element of § 78ff superfluous in the Tenth Circuit. Without any express indication that Congress intended otherwise, we join the Second Circuit and conclude that both § 78ff and § 1001 proscribe the making of false statements to the SEC, and the government may prosecute such conduct under either statute.

For the reasons contained in Part II.A. of the opinion, Wiles' and Schleibaum's convictions on Count I of the respective indictments charging them with a violation of 18 U.S.C. § 1001 are vacated. For the reasons contained in Parts II.B-F. of the opinion, the district court's judgments are affirmed in all other respects.

AFFIRMED IN PART, VACATED IN PART, and REMANDED for further proceedings consistent with this opinion.

LUCERO, Circuit Judge, with whom EBEL, Circuit Judge, joins, concurring in part, dissenting in part.

Recognizing that the Wiles, Schleibaum and Pappert cases present a common issue, one created by the Supreme Court decision in *United States v. Gaudin*, ____ U.S. ____, 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995), this court agreed to consider two related questions en banc: (1) "whether the failure to instruct the jury on the issue of materiality ... constitutes a structural error"; and if so, (2) "whether the error is reversible per se or reviewable under the plainerror analysis set out in *United States v. Olano*, [507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508] (1993)." En Banc Order (June 3, 1996). I concur in the majority's conclusion as to the first question. But I dissent from its "*per se*" resolution of the second. The mere classification of an error as "struc-

tural" does not automatically dictate reversal under Fed.R.Crim.P. 52(b) plain-error review.[1]

From its earliest roots, plain-error review has been discretionary. *Wiborg v. United States*, one of the first statements of the common law rule, holds that "if a plain error was committed in a matter so absolutely vital to defendants, *we feel ourselves at liberty to correct it,*" even if the defendant has "not duly excepted" the error. 163 U.S. 632, 658, 659, 16 S.Ct. 1127, 1137, 1138, 41 L.Ed. 289 (1896) (emphasis added).[2] Over time, appellate discretion to correct for plain error came to be exercised solely for the limited purpose of avoiding miscarriages of justice. *See United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985). In *United States v. Atkinson*, the Court established a different approach to plain error while maintaining the discretion of earlier cases. In what has come to be known as the Atkinson standard, the Supreme Court held that "[i]n exceptional circumstances, especially in criminal cases, appellate courts . . . *may*, of their own motion, notice errors to which no exception has been taken . . . [if they] seriously affect the fairness, integrity or public reputation of judicial proceedings." 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936) (emphasis added).

Referring to unnoticed structural errors, the Court in *Olano* subsequently noted that "[t]here may be a special

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[1] Because we decide only the common legal issues of the three cases en banc, we should not purport to apply the common legal rule to the disparate facts of each case. Rather, all three cases should be resubmitted to the panels to decide the outcome under the rule we enunciate today. *See Turner v. Small Business Admin. (In re Turner)*, 84 F.3d 1294, 1299 (10th Cir. 1996) (en banc) deciding en banc issue as a matter of law and remanding to panel for further consideration in light of new rule).

[2] The drafters of the federal rules cite *Wiborg* for the common law rule. Fed.R.Crim.P. 52(b) (advisory committee note).

category of forfeited errors that *can* be corrected regardless of their effect on the outcome." 507 U.S. at 735, 113 S.Ct. at 1778 (emphasis added). Finally, Rule 52(b) is couched in discretionary terms: "Plain errors or defects affecting substantial rights *may be noticed* although they were not brought to the attention of the court." Fed.R.Crim.P. 52(b) (emphasis added); *compare* Fed.R.Crim.P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights *shall* be disregarded." (Emphasis added)). The Supreme Court has carefully avoided mandating automatic reversal for plain errors. In a case arising from our circuit, the Court unambiguously states that "a *per se* approach to plain-error review is flawed." *Young*, 470 U.S. at 16 n. 14, 105 S.Ct. at 1047 n. 14.

The court today ignores this long line of authority. Although the majority claims the mantle of Supreme Court precedent, I do not believe any case supports a rule that strips appellate courts of discretion to review cases for plain errors merely because they are labeled "structural."[3] The majority cites *Olano* for the proposition that "structural" error falls within that "'special category of forfeited errors' that does not require a showing of prejudice, but rather, *must be* corrected." Maj. Op. at 1061-62 (emphasis in original). *Olano* states no such principle. It holds that "this issue need not be addressed." *Olano*, 507 U.S. at 735, 113 S.Ct. at 1778. It does no more than suggest that under the third prong of plain-error analysis there are some errors

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[3]The majority cites *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 3105-06, 92 L.Ed.2d 460 (1986), and *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081-82, 124 L.Ed.2d 182 (1993), for the proposition that structural errors mandate reversal. These cases, like all the others cited by the majority on the question of structural error, address harmless, not plain errors. The language in *Rose* and *Sullivan*, although broad, cannot be read outside of the harmless-error context. *See infra* at p. 1070.

that may automatically affect substantial rights without a showing of prejudice, and that "can" be corrected. *Id.*

The inescapable import of the majority's opinion is that the error asserted here escapes review under plain-error's fourth prong, the *Atkinson* standard. *See* Maj. Op. at 1062 n.13. To the extent the majority relies on *Olano*, it is mistaken. The Supreme Court majority in *Olano* never considers whether the error before it "would have warranted" correction under the fourth prong of the plain-error test, because it concludes that the error (allowing alternate jurors to participate in the jury deliberations) was not prejudicial and therefore did not "affect substantial rights." See *Olano*, 507 U.S. at 741, 113 S.Ct. at 1781. It thus never reaches the issue before us. Justice Stevens, however, speaking for three members of the Court, views the error in *Olano* as structural and necessarily affecting the defendant's substantial rights, thus satisfying the third prong of plain-error review. Id. at 743-44, 113 S.Ct. at 1782-83 (Stevens, J., dissenting). While Justice Stevens concludes that under harmless-error review the error is automatically reversible, id. at 744, 113 S.Ct. at 1783, he continues:

> Reading "substantial rights" the same way in Rule 52(b) as in Rule 52(a) does not, of course, eliminate the difference between cases in which no objection is made and those in which one is. A nonforfeited error affecting substantial rights must be corrected under Rule 52(a). A forfeited error, however, even if it is plain and affects substantial rights, "may" be corrected at the discretion of the reviewing court under Rule 52(b). It is this distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless-error and

> plain-error review, and also every incentive to the defendant to raise objections at the trial level.

Id. (citation omitted). Hence, the only three members of the Supreme Court to have addressed the precise issue before us would find fault with the result we reach today.[4]

The Supreme Court's rejection of an automatic rule of reversal makes good sense. Such a rule could free a defendant even though the structural error did not seriously affect the "fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732, 113 S.Ct. at 1776 (quotation omitted). Moreover, automatic reversal omits appellate analysis of the entire record under the *Atkinson* standard, thus preventing the Supreme Court from reviewing our decision to correct the error for any abuse of discretion. *See Young*, 470 U.S. at 15-16, 105 S.Ct. at 1046 (majority opinion), at 22 n.1, 105 S.Ct. at 1049 n. 1 (Brennan, J. concurring in part and dissenting in part). Notwithstanding the uninterrupted line of cases giving appellate courts discretion to correct plain error, the majority is enamored of its *per se* rule and claims that the Supreme Court requires it. I disagree.

The majority's preoccupation with the *per se* rule stems from its focus on the interrelationship between harmless-error review and structural errors. Harmless-error analysis,

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[4]On this point, the Supreme Court has recently granted review of an unpublished Eleventh Circuit decision, *United States v. Johnson*, No. 95-2417, 82 F.3d 429 (11th Cir.), *cert. granted*, ____ U.S. ____, 117 S.Ct. 451, 136 L.Ed.2d 346 (1996), that may resolve the issues before the en banc court. Moreover, our inquiry in the *Pappert* case is complicated by the fact that the Supreme Court has yet to decide whether materiality is an element of the § 1014 offense, let alone whether the error falls within a special category of cases that would mandate reversal under harmlesserror analysis. *See United States v. Wells*, 63 F.3d 745 (8th Cir.1995), *cert. granted*, ____ U.S. ____, 116 S.Ct. 1540, 134 L.Ed.2d 645 (1996).

under which all of the structural error cases cited by the majority were decided, serves a different function from plain-error review. Harmless-error rules were adopted to avoid automatic reversal for trivial errors that have no effect on the outcome of a trial. *See* Roger J. Traynor, *The Riddle of Harmless Error* 13-14 (1970). Such rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). In the same vein, the Court notes "that the harmless error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.' " *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986)).

Errors involving the presentation of the case to the jury, labeled "trial errors," may be "quantitatively assessed in the context of other evidence presented in order to determine whether their admission was harmless beyond a reasonable doubt." *Id.* at 307-08, 111 S.Ct. at 1264. Other errors, labeled structural, are regarded as "defects in the constitution of the trial mechanism, which defy analysis by 'harmlesserror' standards." *Id.* at 309, 111 S.Ct. at 1265. These latter errors share "a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310, 111 S.Ct. at 1265. Such errors create "consequences that are necessarily unquantifiable and indeterminate." *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 2083, 124 L.Ed.2d 182 (1993). In case marred by structural error it is impossible to review for harmless error and "quantitatively assess[ ] [the effect of the error] in the context of other evidence presented." *Fulminante*, 499 U.S. at 308, 111

S.Ct. at 1264. For this reason, the "affecting substantial rights" third prong of *Olano* is assumed satisfied even without proof of prejudice.[5]

I part with the majority to the extent that it regards structural error as automatically deeming judicial proceed-

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[5]The distinction between trial and structural error was born in controversy in the 1991 *Fulminante* decision. Justice White, speaking for four dissenters, called the distinction a "meaningless dichotomy," noting "our jurisprudence on harmless error has not classified so neatly the errors at issue." 499 U.S. at 290-91, 111 S.Ct. at 1254-55. Chief Judge Harry T. Edwards refers to it as a "distinction that I find baffling and mostly unhelpful." Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L.Rev. 1167, 1207 (1995). If the essential distinction between trial and structural errors lies in the susceptibility to being quantitatively assessed in the context of other evidence presented the jury, *see Fulminante*, 499 U.S. at 307-08, 111 S.Ct. at 1263-64, the framework is flawed because the cases labeled as structural and trial errors do not accurately divide on the basis of the feasibility of appellate review. *See* Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv. L.Rev. 152, 164-66 (1991). In essence, the Court has not yet "clearly articulate[d] the structure that structural errors undermine." *Id.* at 164.

At the margin, there is much disagreement about which label to affix to a given error. This point is well demonstrated by the views of my separately dissenting colleague, Judge Briscoe, who would pigeonhole *Gaudin* error in the "trial-error" box, as well as by the wide range of views noted at footnotes 12 and 13 of the majority opinion. The problem with affixing the "structural" label is that it denotes harmless-error consequence, while merely connoting the level of egregiousness of the error; to the extent that it requires correcting effort that does not affect the fundamental fairness of the trial's result, it fuels the criticism of the criminal process that a "guilty defendant is let free on a mere technicality." If the distinction between trial and structural error is to be imported into plain-error analysis, in order to exercise appellate discretion the temptation would be to divine different levels of structural error, some warranting reversal, others not. The majority avoids this Dantean spectacle by ignoring its discretion under plain-error review altogether. Judge Briscoe does so by calling the error under review "trial error."

ings fundamentally unfair, thereby escaping fourth-prong *Atkinson* review. Maj. Op. at 1062 n. 13. Such an approach is both over-inclusive and under-inclusive. Some errors, the admission of a coerced confession, for example, might seem of a sufficiently grave magnitude that "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). Coercing a confession by physical force or psychological torture — the Court draws no distinction between the two, *see, e.g., Rogers v. Richmond*, 365 U.S. 534, 540, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961) — so deeply offends the sense of justice of a civilized society, *see Fulminante*, 499 U.S. at 293, 111 S.Ct. at 1256 (White, J., dissenting), that every practicable step should be taken to eradicate the practice. Yet *Fulminante* specifically holds that admission of a coerced confession into evidence is not structural error. Rather, such admission is subject to harmless-error review precisely because it does not affect the structure within which the trial proceeds. *Id.* at 309-11, 111 S.Ct. at 1264-66. As wrong as it is to allow the jury to consider a coerced confession, that flaw is not structural, and it does not escape harmless-error review.

By contrast, the claimed error in these cases, that of taking an element of the offense away from the jury, is structural in the sense defined by *Fulminante* and applied in *Sullivan*. Yet I cannot conclude that this error requires reversal in every case, regardless of the posture in which it was raised. True, this error defies harmless-error review. This is because we cannot meaningfully contemplate its effect on the jury's deliberation — the nature of the error was to remove an issue from the jury. Plain-error review, as noted above, has a different focus than harmless-error review; it concerns the error's effect on the fairness of the proceedings. Given that different focus, an error in the

structure of the proceedings that defies harmless-error review remains subject to plain-error analysis. In some cases, such as where there is overwhelming evidence on an element and the defendant never even contested its factual predicate, the judicial proceedings, taken as a whole, might be considered eminently fair despite the structural error.

Because a defendant may either waive or forfeit almost any constitutional right, see *Olano*, 507 U.S. at 731, 113 S.Ct. at 1776, plain-error review[6] acts to safeguard the fundamental justice and fairness embodied in the judicial process. Contrary to the majority's assumption, plain-error review does not look merely at what the jury might have done had the defendant not forfeited his right. *See Young*, 470 U.S. at 15-16, 105 S.Ct. at 1046-47. While "[a] defendant may assuredly insist upon observance of [the jury trial] guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt," *Carella v. California*, 491 U.S. 263, 268, 109 S.Ct. 2419, 2422, 105 L.Ed.2d 218 (1989) (Scalia, J., concur-

[6] In their briefing en banc, appellants argue that harmless-error, rather than plain-error review is applicable to cases such as this, where the opportunity to object was foreclosed by the then-current state of the law. Because the constitutional right only arose after trial, appellants contend that they did not "forfeit" any right. Strictly speaking, appellants are correct. Cases such as this do not involve the forfeiture of existing rights. Nevertheless, courts generally apply plain-error, not harmless-error review in such situations. *See, e.g., United States v. Randazzo*, 80 F.3d 623, 631 (1st Cir.1996) (applying plain-error review); *United States v. Washington*, 12 F.3d 1128, 1138-39 (D.C.Cir.) (same), *cert. denied*, ___ U.S. ___, 115 S.Ct. 98, 130 L.Ed.2d 47 (1994); *but see United States v. Keys*, 95 F.3d 874, 878 (9th Cir.1996) (en banc) (applying harmless-error review). I believe that application of plain-error review in this case strikes the proper balance between the defendants' interest in having a new right considered on direct review, and the judicial system's interest in orderly administration of cases and finality of proceedings in which the trial court acted properly under the then-existing law. *See Randazzo*, 80 F.3d at 631-32.

ring), where the defendant fails to insist on observance of this guarantee at trial we are under no obligation to restore it for him on appeal.[7]

The majority's conclusion misreads plain-error law. It gives shrewd attorneys the opportunity to engage in improper gamesmanship at no risk to their clients, and is inappropriate as a matter of policy. One need not exercise asymptotic levels of imagination to conceive that under the rule announced to day, counsel may deliberately overlook a

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[7] In footnote 10, the majority announces an exception to the rule that *Gaudin* errors are structural and must be reversed in all circumstances. This exception, for cases in which the defendant stipulates to removal of an element, is of limited utility and should have no bearing on our ability to review for plain error. I agree that if a defendant stipulates to an element of the offense, it is not error to remove it from the jury's consideration. *See United States v. Mason*, 85 F.3d 471, 472 (10th Cir.1996). But because the "structuralness" of the *Gaudin*-type error arises from the denial of the defendant's right to have the jury decide each element of the offense beyond a reasonable doubt, an informal concession of an element by the defendant or his attorney would not remove his right to a jury determination of that element. *See* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 21.1(h) (1984) (jury trial may only be waived by "express and intelligent consent of the defendant," and should be made personally by defendant, either in writing or in open court); *see also* Fed.R.Crim.P. 23(a) (waiver of jury trial must be in writing).

While the majority suggests that "[a] situation may arise when a reviewing court may conclude with complete confidence that a failure to instruct on an element of an offense did not play a role in the jury's verdict on that offense," applying footnote 10 to anything short of a stipulation would engage us in determinations of "harmless structural error." *See California v. Roy*, ____ U.S. ____, ____ — ____, 117 S.Ct. 337, 339-40, 136 L.Ed.2d 266 (1996) (Scalia, J., concurring) (where an element of the offense was not presented to the jury, the error can be harmless "only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well."). In any event, whether or not the error is deemed structural, it should not limit our review for plain error.

structural error in the trial proceeding, such as a faulty reasonable doubt instruction to the jury, *see Sullivan*, 508 U.S. 275, 113 S.Ct. 2078, knowing that if the jury convicts, her client will nonetheless be guaranteed a new trial. The whole purpose of distinguishing between harmless-error and plain-error review is to eliminate these tactics. We should leave plain-error review for its intended purpose: correcting those errors under Rule 52(b) which "seriously affect the fairness, integrity or public reputation of judicial proceedings."

For the foregoing reasons, while I join in the court's conclusion as to Part II.A.2.c., I respectfully dissent from the court's resolution of the second question before us, Part II.A.2.b. I would hold that failure to instruct under *Gaudin* is not error that automatically mandates reversal. I would analyze the facts of each case under the fourth prong, the *Atkinson* standard of plain-error review, as required by *Olano*. I would resubmit the individual cases back to the original panels for decisions pursuant to this standard.

BRISCOE, Circuit Judge, dissenting:

Two issues are presently before this court for an en banc consideration: (1) "whether the failure to instruct the jury on the issue of materiality . . . constitutes a structural error"; and, if so, (2) "whether the error is reversible per se or reviewable under the plain error analysis set out in *United States v. Olano*, [507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508] (1993)." In answering these questions, I conclude failure to instruct the jury on the issue of materiality is not structural error. Therefore, I dissent from the majority's conclusion as to the first question. I agree that failure to instruct on the element of materiality is error, but whether it is reversible error presents a question beyond those designated by this court for en banc review. Answering the first question in the negative, I need not reach the second question. Because I conclude the error is not structural, I

would apply the plain error analysis of Rule 52(b) in the absence of a timely objection at trial. However, given the unique circumstance created in these cases as a result of an intervening change in the settled law of this circuit, I would require the government to bear the burden of proving the absence of prejudice because defendants' failure to object was the result of their reliance upon settled law. *See United States v. Viola*, 35 F.3d 37, 42 (2d Cir.1994), *cert. denied* ____ U.S. ____, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995). I would resubmit the individual cases to the original panels for decision pursuant to these standards. I express no opinion regarding whether the convictions of the defendants should be vacated, as those questions are more appropriate for the panel in each case to decide.

In a recent decision by the Supreme Court in a habeas case, *California v. Roy*, ____ U.S. ____, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996), the Court addressed the principal question before this court — whether failure to include an instruction on an element of a charged offense is structural error. The Court determined whether a *Chapman*[1] or a *Kotteakos*[2] standard for harmless error should be applied in a habeas case where the petitioner alleged the jury instructions underlying his conviction omitted an element of the charged offense. The majority opinion noted that if the omission had been a "structural defect," no form of harmless error analysis could be applied. The majority held that a *Kotteakos* harmless error standard inquiring as to whether there is a " 'grave doubt as to the harmlessness of an error' " would apply to the habeas review of Roy's conviction. The Court did not conclude that omission of an instruction on an element of an offense was structural error requiring auto-

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[1] *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[2] *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

matic reversal, but rather referred to the error throughout its opinion as "trial error"[3] and ultimately remanded the case for further review under the harmless error standard it delineated.

Justice Scalia, concurring in *Roy*, agreed that omission of an instruction on an element of the crime is not itself structural error, but clarified that the error could be harmless only if the reviewing court on remand had the requisite degree of confidence that the jury necessarily found the existence of the omitted element. Without such a finding by the jury, reversal would be required under the principles of *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Interestingly, Justice Scalia cited *United States v. Gaudin*, ____ U.S. ____, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), in reaching the conclusion that absence of a formal verdict on a single element of an offense would not require automatic reversal.

The fact that *Roy* arises in the context of habeas review rather than in the context of a direct appeal is irrelevant. Although this distinction affects which harmless error standard applies, it does not alter the Court's conclusion that the omission of an instruction on an element of a crime is a "trial error."

The majority has compiled a list of cases where the error established by appellant required automatic reversal. Errors which require automatic reversal are structural errors. *See, e.g., Sullivan*, 508 U.S. at 282, 113 S.Ct. at 2083 (there are two classes of constitutional error — "trial error" subject to harmless error analysis, and "structural error" requiring automatic reversal) (Rehnquist, C.J., concurring). Not all constitutional violations require automatic reversal. *Chapman*, 386 U.S. 18, 87 S.Ct. 824. Only the most exceptional

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[3]The Court explicitly noted that the *Kotteakos* standard does not apply to structural errors.

do. *See, e.g. Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). As I read the majority opinion, it does not add another constitutional right to the list of rights which will require automatic reversal if violated. Instead, the majority opinion holds that failure to instruct the jury on the element of materiality is an example of an error identified as "structural error" in Sullivan — the right to a jury determination of guilt on each element of the charged offense beyond a reasonable doubt. I disagree that absence of an instruction on materiality conclusively establishes a violation of this basic Sixth Amendment right and is thus, by itself, structural error.

Appellate courts should uphold the verdict reached in the district court unless, after inquiry, it is clear that reversal is unavoidable to protect the defendant's right to a fair trial.

> [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that might have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitled a criminal defendant to a fair trial, not a perfect one."

Rose, 478 U.S. at 579, 106 S.Ct at 3106 (citations omitted).

Even if *Roy* were completely distinguishable from the question we face, the cases decided by the Supreme Court

which have identified the type of Sixth Amendment violation requiring automatic reversal do not support a conclusion that the error here requires automatic reversal and is therefore structural. The error of omitting an instruction on materiality does not preclude us from evaluating whether the evidence established guilt beyond a reasonable doubt or whether the jury rendered a verdict satisfying the interest of fairness.

In *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S.Ct 2450, 2458-59, 61 L.Ed.2d 39 (1979), the Court held that an instruction creating a presumption of malice violated due process by shifting the burden of proof on intent to the defendant, contrary to *In re Winship*, 397 U.S. 358, 90 S.Ct 1068, 25 L.Ed.2d 368 (1970) (holding due process of law required conviction by proof beyond a reasonable doubt). In *Rose*, the Court addressed a question that *Sandstrom* left unanswered — whether a *Sandstrom* error required automatic reversal or, instead, was subject to a harmless error analysis. The Court in *Rose* noted that a directed verdict for the prosecution would violate the Sixth Amendment right to a jury trial in serious criminal cases and would require automatic reversal. "Where that right [to a jury verdict] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." 478 U.S. at 578, 106 S.Ct at 3106. However, the Court noted that a *Sandstrom* error was distinguishable from a directed verdict in that the jury still considered the disputed element. The court reasoned it was possible that no jury could have found defendant committed the criminal act without also implicitly finding malice was established beyond a reasonable doubt. In such a case, the erroneous instruction on malice "is simply superfluous." *Rose* 478 U.S. at 581, 106 S.Ct. at 3107. Despite the erroneous instruction, there would be no constitutional violation be-

cause the jury would have found " 'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Id.*

Thus, in *Sandstrom*, the Court held an erroneous instruction regarding the presumption of an element could produce a constitutionally deficient verdict. In *Rose*, the Court held that where an erroneous set of instructions to the jury does not "altogether deny[y]" the possibility that the jury found " 'every fact necessary' to establish every element of the offense beyond a reasonable doubt," it is proper to inquire whether there has in fact been a violation of this constitutional right before requiring that the verdict be reversed. 478 U.S. at 578, 581, 106 S.Ct. at 3106, 3107. Hence, while an erroneous instruction alone is not structural error requiring automatic reversal, it may, in a given case, prejudice the defendant's substantial right to a jury verdict on each element of a charge. Whether an erroneous instruction violated the defendant's substantial rights in a given case is exactly the type of inquiry a Rule 52 analysis serves to answer.

The implications of *Sandstrom* and *Rose* to the present case are clear. As in *Sandstrom*, the Court in *Gaudin* identified an error capable of resulting a constitutionally deficient verdict. As in *Sandstrom*, the constitutional right at risk is the right to a determination by a jury on each element of the offense beyond a reasonable doubt. As in *Rose*, we now face the question of whether a particular error in instructing a jury will always deny the Sixth Amendment right to a jury finding of guilty on each element and therefore automatically require reversal, or whether in some cases the instructional error will not violate this Sixth Amendment right, providing defendant with an imperfect but fair trial.

The question before us assumes the jury was instructed on all but one element of the subject offense. Unlike the case

where there is a directed verdict for the prosecution, in a case where an instruction on a single element is omitted, the right to a jury trial is not "altogether denied." Had the predicate facts so conclusively established materiality that no rational jury could reach the verdicts rendered without also finding the materiality element to be satisfied, failure to instruct on the element of materiality would be superfluous. If the jury implicitly found the materiality element was satisfied, it is of no constitutional moment that the district court, acting outside its authority, found the element to be satisfied as well.[4] As in *Rose*, it is conceivable both that the error could occur and that the constitutional right at issue could be preserved intact.[5] Thus, absence of an instruction

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[4]In such a case, the jury would have fulfilled its constitutional function to "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977).

[5]The majority opinion is largely consistent with the view I have set out. In footnote 10, the opinion states: "A situation may arise when a reviewing court may conclude with complete confidence that a failure to instruct on an element of the offense did not play a role in the jury's verdict on that offense .... Because both *Wiles* and *Schleibaum* contested the element of materiality at their respective trials, we are not confronted with that situation."

Similarly, in applying *Roy*, the majority notes its finding of structural error is based in part on the fact discerned from the *Wiles* and *Schleibaum* case records that the juries "did not render a verdict, formal or otherwise, ... on the element of materiality." I disagree with the majority's view that the broad and far-reaching generic questions we have instructed the parties to brief can be answered by reference to the facts of two of the three cases we have consolidated herein. We have agreed to address whether failure to instruct on the element of materiality is structural error. We have not limited our questions to the particular facts developed in *Wiles* and *Schleibaum*. To the extent the majority reasons that *Wiles'* and *Schleibaum's* convictions should be vacated because after looking at the appellate records the majority is convinced the jury did not render "a verdict, formal or otherwise," it has engaged in

on materiality is distinguishable from the absence of a reasonable doubt instruction in *Sullivan*, where a harmless error analysis was simply impossible as there could be no basis in the record to conclude the jury implicitly applied a reasonable doubt standard because lack of such an instruction "vitiates all the jury's findings." 508 U.S. at 281, 113 S.Ct. at 2082. It is precisely the ability to review the record and render a meaningful determination as to whether an error affected a defendant's substantial rights that distinguishes a trial error from a structural error. *Fulminante*, 499 U.S. at 307-08, 111 S.Ct. at 1264. Where the jury has not received an instruction on reasonable doubt, a reviewing court will always remain in serious doubt that the defendant's basic Sixth Amendment rights have been adequately safeguarded. In contrast, where the jury has not received an instruction on materiality, a reviewing court *will not always* harbor such uncertainty.

The majority contends reversal is required because Rule 52 review wold require a "wrong entity" — the appellate court — to make the determination on materiality. A Rule 52 standard that looks at the question of whether the jury found the missing element to be satisfied, rather than what a reasonable jury would have found, places the determination of materiality in the "right entity" — the jury. Applying such a Rule 52 standard does not offend the Sixth Amendment by placing the determination of guilt outside of the jury. *See Roy*, ____ U.S. at ____-____, 117 S.Ct. at 339-40; *Sullivan*, 508 U.S. at 280, 113 S.Ct. at 2082; *Carella v. California*, 491 U.S. 263, 268-70, 109 S.Ct. 2419, 2422-23, 105 L.Ed.2d 218 (1989); *Rose*, 478 U.S. at 580-81, 106 S.Ct. at 3107; *cf. United Brotherhood of*

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a form of the Rule 52 analysis which I advocate. The majority apparently does not vacate the convictions simply because of a missing instruction. The majority finds the missing instruction merits reversal because it cannot find that the jury "otherwise" satisfied defendants' Sixth Amendment rights.

Carpenters & Joiners of America v. United States, 330 U.S. 395, 408, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947), *Bollenbach v. United States*, 326 U.S. 607, 614-15, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946) (strength of evidence no substitute for actual jury finding). Here, it is not conclusively established that the constitutional rights identified in *Sullivan* as the basis for an automatic reversal have been violated by the absence of a materiality instruction alone. By labeling the absence of a materiality instruction as structural error, the majority opinion requires a new trial without regard to whether the constitutional guarantee to a fair trial before an impartial jury has been satisfied.

I conclude failure to instruct the jury on the element of materiality, by itself, is trial error. As a trial error, it is subject to analysis for plain error under Rule 52(b) in the absence of a timely objection at trial. However, as the failure to object was the result of defendants' reliance upon the settled law of this circuit, the government should bear the burden of proving the absence of prejudice. See *Viola*, 35 F.3d at 42.

KELLY and HENRY, Circuit Judges, join in the foregoing dissent.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,
v.
Quentin T. WILES, *Defendant-Appellant.*

No. 94-1592

United States Court of Appeals,
Tenth Circuit.

Feb. 14, 1997.

Before BALDOCK and BRORBY, Circuit Judges.*

ORDER ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

BALDOCK, Circuit Judge.

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*The late Honorable Oliver Seth, United States Senior Circuit Judge, heard oral argument and participated in the panel's conference of this appeal, but passed away prior to its final resolution. *See United States v. Wiles*, 102 F.3d 1043, 1043 n.** (10th Cir. 1996). The practice of this court permits the remaining two panel judges if in agreement to act as a quorum in resolving the appeal. *E.g., United States v. Gacnik*, 50 F.3d 848, 850 n.$ (10th Cir. 1995) (citing 28 U.S.C. § 46(d)); *Employee Trustees v. Employer Trustees*, 959 F.2d 176, 177 n.* (10th Cir. 1992) (same); *see also* S.Rep.No. 97-275, at 9 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 19 (circuit court may adopt procedure "permitting the disposition of an appeal in situations in which one of the three [panel] judges dies or becomes disabled and the remaining two agree on the disposition"); *Murray v. National Broadcasting Co.*, 35 F.3d 45, 48 (2nd Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 734, 130 L.Ed.2d 637 (1995) (remaining two judges of original three judge panel may decide petition for rehearing without third judge).

Before the court is Defendant Quentin T. Wiles' Petition for Rehearing and Suggestion for Rehearing En Banc. Fed.R.App.P. 35 & 40; 10th Cir. R. 35.1 & 40.1. In *United States v. Wiles*, 102 F.3d 1043 (10th Cir.1996), we affirmed Defendant's convictions on one count of securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff(a), and 17 C.F.R. § 240.10b-5, and one count of wire fraud in violation of 18 U.S.C. § 1343, and vacated his conviction on one count of making false statements to the government in violation of 18 U.S.C. 1001.[1] Wiles now claims we "overlooked and misconstrued" four issues in our prior opinion. Wiles suggests we erroneously (1) failed to consider whether the government presented sufficient evidence as to materiality to sustain a conviction on the false statements count; (2) failed to consider whether the district court's instructions on the securities fraud count impermissibly expanded the grand jury's indictment; (3) held that the securities fraud count together with the district court's unanimity instructions thereon did not violate Defendant's right to a unanimous verdict; and (4) held that the district court's failure to instruct the jury as to materiality on the false statements count did not taint the materiality instruction on the wire fraud count. We grant rehearing as to Defendant's first claim only, deny rehearing as to his remaining claims, and now make final disposition of this appeal. *See* Fed.R.App.P. 40 ("If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument . . . .").

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[1] We consolidated Defendant Wiles' appeal with *United States v. Schleibaum*, No. 95-1022 (10th Cir., filed Jan. 25, 1995), also reported at 102 F.3d 1043, because both appeals presented overlapping factual and legal issues. Defendant Schleibaum has not filed a Petition for Rehearing.

I.

[1] Tenth Circuit Rule 40.1 sets the tone for a petition for rehearing:

> 10th Cir. R. 40.1. Grounds for petition. — A petition for rehearing should not be filed routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court. If a petition for rehearing is found to be wholly without merit, vexatious or filed for delay, the court may tax a sum not exceeding $500.00. At the court's order, counsel may be required personally to pay these costs to the opposing party....

A petition for rehearing should be more than a restatement of arguments originally presented on appeal and a petition based on such is "without merit" under Rule 40.1. *Westcot Corp. v. Edo Corp.*, 857 F.2d 1387, 1388 (10th Cir. 1988).

[2] On appeal Defendant argued, and in our prior opinion we addressed, each of Defendant's latter three claims set forth in his petition for rehearing. First, we rejected Defendant's claim that the district court's failure to instruct the jury as to materiality on the false statements count tainted the jury's verdict on the remaining counts. We stated:

> We are not confronted with a situation where a failure to instruct on an element of a crime as to one count of the indictment might taint convictions on remaining counts. Each count of the respective indictments against Wiles and Schleibaum charged them with separate and distinct substantive crimes. The district court's failure to instruct on the element of materiality under § 1001 had no bearing upon the instructions which the court tendered on the remaining counts.

Wiles, 102 F.3d at 1059 n. 11 (internal citations omitted). Similarly, we rejected Defendant's claim that the district

court's instructions on the securities fraud count violated Defendant's right to a unanimous verdict. We stated:

> Wiles suggests that . . . the jury did not understand the court's unanimity instruction and that the risk of a non-unanimous verdict against him was significant and prejudicial. Wiles' speculation is insufficient to cast doubt upon the jury's verdict . . . .
>
> We must presume that the jurors remained loyal to their oaths and conscientiously followed the district court's instructions. This assumption is fundamental to our system of justice.

Id. at 1062-63 (internal citations omitted). Finally, we rejected Defendant's argument that the district court's instructions on the securities fraud count impermissibly expanded the grand jury's indictment in violation of due process. We stated:

> Wiles raises two additional claims which he failed to raise in the district court: (1) the jury instructions as to the securities fraud charge improperly expanded the grand jury's indictment; and (2) the unanimity instruction as to the wire fraud charge was equivocal; both the violation of the Fifth Amendment. Applying . . . plain error analysis . . . we conclude that Wiles claims do not constitute plain error and thus, he has waived his right to present these claims on appeal.

Id. at 1053 n. 5. Our reference to waiver in the foregoing excerpt may have been misleading because under our prior precedent, jury instructions which have the effect of amending an indictment "constitute plain error." *United States v. Levine*, 41 F.3d 607, 617 n. 13 (10th Cir. 1994). However, "plain error cannot be found where there is no error at all." *United States v. Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996) (citing *United States v. Olano*, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 1776-78, 123 L.Ed.2d 508 (1993)). After care-

ful consideration, we concluded that the district court's instructions did not in effect expand the grand jury's indictment and thus no error, or plain error, occurred. Accordingly, Defendant's claim warranted no further discussion then, and warrants no further discussion now.

II.

Defendant's claim that we improperly failed to consider the sufficiency of the evidence on the element of materiality on the false statements count requires a more detailed discussion. In our prior opinion, we reasoned that where the jury rendered no verdict on materiality as a substantive element of the false statements count because the court erroneously decided the element of materiality as a matter of law, no jury verdict existed upon which harmless or plain error analysis could operate *Wiles*, 102 F.3d at 1053-61.[2] We held such error to be structural and vacated Defendant's conviction on the false statements count. *Id.* at 1060-61. Given this result, we deemed a discussion of the sufficiency of the evidence on the element of materiality unnecessary.

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[2] In *Wiles*, we explained the analysis to be undertaken in such cases. The first determination to be made is whether an error occurred at trial. If an error occurred, the next inquiry is whether an actual jury verdict exists upon which harmless or plain error analysis can operate. In *Wiles*, such a verdict did not exist because the district court had removed the element of materiality from the jury's consideration. However, in many cases that will not be so clear. In such cases, a court will have to delve into the question of whether the facts and other instructions are such that the jury could not have returned its verdict without also finding the omitted element. If a jury verdict on the element necessarily follows, a verdict on the element exists and Rule 52 analysis has a predicate upon which to focus. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-81, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993) (explaining the interrelation of *Chapman* analysis and structural error). Only if there is no verdict on the element upon which harmless or plain error analysis can operate is there structural error.

Id. at 1053 N. 4; *see Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984) (protection against double jeopardy applies "only if there has been some event, such as an acquittal, which terminates the original jeopardy").

Defendant correctly points out, however, that this circuit has held that when we reverse on appeal because of a procedural error at trial and remand for a new trial, the prohibition against double jeopardy requires us to address a defendant's claim that the evidence presented at trial on the reversed count was insufficient. *United States v. Haddock*, 961 F.2d 933, 934 (10th Cir.), *cert. denied*, 506 U.S. 828, 113 S.Ct. 88, 121 L.Ed.2d 50 (1992). Constrained by our precedent on this matter, we vacate footnote four of our prior opinion and proceed to discuss the sufficiency of the evidence of materiality against Defendant on the false statements count.

We have labeled a false statement as "material" if the statement "'has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made.'" *United States v. Harrod*, 981 F.2d 1171, 1176 (10th Cir. 1992), *cert. denied*, 508 U.S. 913, 113 S.Ct. 2350, 124 L.Ed.2d 259 (1993) (quoting *United States v. Irwin*, 654 F.2d 671, 677 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016, 102 S.Ct. 1709, 72 L.Ed.2d 133 (1982)). At Defendant's trial, the government presented evidence that the false filings not only had a tendency to influence the SEC, but that those filings did in fact influence the SEC. The district court took judicial notice of *SEC v. Wiles*, 91-CV-1393 (D. Colo., filed Aug. 14, 1991), in which the SEC sued Wiles and his cohorts for relief from numerous fraudulent acts, including the making of false statements to the SEC. Numerous government witnesses testified that the fraudulent statements contained in the 1987 10-K Report were material due to the large

differential between the actual figures and those reported. Wiles, perhaps inadvertently, elicited testimony from Owen Taranta on cross examination that the several million dollars of false entries placed on Miniscribe's books in 1987 were material. Furthermore, defense witness Jack Grace of Coopers & Lybrand testified as to the false statements' materiality. On cross examination, the government elicited the following testimony from Grace:

> [Question:] What is the reduction in bottom-line profits for 1987 as a result of Coopers & Lybrand's restatement of the financial statements?
>
> [Answer:] The reduction was from a net income of 31 million to a net income of 9 million, which is a change of about 22 million.
>
> [Question:] Any question from an accounting perspective that that's a material change?
>
> [Answer:] No, no question about it.

Aplts.App. Vol. IX at 2423. Finally, former Miniscribe directors Bruce Bee and Russell Planitzer testified as to the SEC's regulatory scheme and filing requirements.

[3] Defendant's claim that the evidence which the government presented at trial was insufficient to sustain a false statements conviction against him under 18 U.S.C. § 1001 is not well taken. Construing the evidence in a light most favorable to the government, as we must in any sufficiency review, *Wiles*, 102 F.3d at 1063, we conclude that the evidence which the government presented was sufficient to establish the element of materiality on the false statements count. Miniscribe's false 1987 10-K Report was capable of influencing, and did in fact influence, the SEC to take remedial action against Defendant.

REHEARING GRANTED IN PART, DENIED IN PART, and RELIEF DENIED.[3] THE MANDATE SHALL ISSUE FORTHWITH WITHOUT DELAY. NO MOTION TO STAY THE MANDATE SHALL BE ENTERTAINED.[4]

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[3]In accordance with Fed.R.App.P. 35(b), the clerk transmitted Defendant's suggestion for rehearing en banc to all the judges of the court in regular active service. No member of the panel and no judge in regular active service having requested a poll on rehearing en banc, Defendant's suggestion for rehearing en banc is DENIED.

[4]Defendant's motion to file a reply brief in support of his petition for rehearing and suggestion for rehearing en banc is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Case No. 93-CR-105

UNITED STATES OF AMERICA,
Plaintiff,

v.

QUENTIN T. WILES,

Defendant.

INDICTMENT

18 U.S.C. §§ 2, 1001 and 1343
15 U.S.C. §§ 78j(b) and 78ff(a),
17 C.F.R. § 240.10b-5

Introduction

The Grand Jury charges that at all times material herein:

1. MiniScribe Corporation (MiniScribe), a manufacturer of disk drives, was a Delaware corporation with headquarters in Longmont, Colorado, and manufacturing facilities in Longmont, Singapore and Hong Kong. MiniScribe's common stock was quoted on the National Association of Securities Dealers, Inc. Automated Quotation System (NASDAQ) as a National Market System stock.

2. Hambrecht & Quist, a privately held California corporation, through its subsidiary Hambrecht & Quist, Inc. (H&Q), engaged in the broker dealer business and made venture capital investments. H&Q, on behalf of a group of individuals and entities, made a venture capital investment of approximately $20,000,000 in MiniScribe in 1985 and thereby gained control of MiniScribe.

3. Defendant WILES, a resident of California, by virtue of the H&Q investment, was made Chairman of the Board

of Directors and Chief Executive Officer of MiniScribe. As a MiniScribe officer, Defendant WILES owed a duty of honesty to MiniScribe's stockholders regarding the company's operations, financial condition and earnings. He was also Associate Chairman of H&Q and in charge of several other publicly traded companies. WILES' compensation at MiniScribe consisted of salary, cash bonuses and stock sales, which are summarized as follows:

Year	Salary	Cash Bonus	Proceeds from Stock Sales
1987	$183,961	$130,000	-0-
1988	$254,876	$155,000	$1,711,250
1989	$ 53,143	-0-	-0-

4. Patrick J. Schleibaum (Schleibaum), who is not indicted herein, was Chief Financial Officer, Corporate Secretary and Treasurer of MiniScribe until December, 1987, at which time he became Vice President of Administration until August, 1988, when he left the company. Schleibaum was paid a nominal salary by MiniScribe until January, 1989 in order to allow certain previously awarded stock options to vest.

5. Gerald W. Goodman (Goodman), who is not indicted herein, was a Director, President and Chief operating Officer of MiniScribe.

6. Owen P. Taranta (Taranta), who is not indicted herein, was in MiniScribe's Operations until September, 1987, when he became acting Chief Financial Officer until early 1988 when he returned to operations.

7. William P. Lorea (Lorea), who is not indicted herein, was in MiniScribe's Accounting Department until February, 1988, when he became Chief Financial officer, Corporate Secretary and Treasurer.

8. Jesse C. Parker (Parker), who is not indicted herein, was an Executive Vice President in charge of MiniScribe's Far East operations until February, 1988.

9. Kenneth A. Huff (Huff), who is not indicted herein, was a company controller until January, 1988, when he became Chief Financial Officer for MiniScribe's Far East operations.

10. The Securities and Exchange Commission (SEC) was an independent agency of the United States government charged with the duty and responsibility of protecting investors and insuring fair dealing in the trading of securities, which duties and responsibilities were met by, among other things, requiring publicly traded companies to file annual and quarterly financial reports with the SEC.

11. In order to protect the investing public, Title 15, United States Code, Section 78m, together with the rules and regulations promulgated thereunder, required publicly traded companies such as MiniScribe to file true and accurate quarterly and annual financial reports and certain other reports with the SEC. The annual financial report is filed on Form 10-K and must contain financial statements which have been audited by independent public accountants. The quarterly financial reports are filed on Form 10-Q.

12. Standard Chartered Bank (Standard Chartered) is a bank, organized under the laws of England with offices in Chicago, Singapore and Hong Kong.

The Scheme

1. Beginning in or about August of 1987 and continuing thereafter to approximately March of 1989, Defendant WILES, together with others, engaged in an unlawful scheme to defraud, which scheme was perpetrated through materially false and misleading financial statements, misrepresentations and omissions regarding MiniScribe's inflated

inventory, inflated income before taxes and inflated ne income, which financial statements were reported and dis seminated to the SEC, to MiniScribe shareholders, to un witting purchasers and sellers of MiniScribe stock and t Standard Chartered.

2. In furtherance of the scheme to defraud, Defendan WILES in approximately August of 1987, directed Tarant to investigate and determine the status of MiniScribe' inventory.

3. In furtherance of the scheme to defraud, Defendan WILES met with Goodman, Schleibaum, Taranta, Parke and Huff in mid-October of 1987, and received a memoran dum which indicated MiniScribe's reported inventory had shortfall of millions of dollars. Defendant WILES ordere the memorandum destroyed, ordered the participants t conceal the inventory shortfall and discussed certain illici efforts to conceal said shortfall.

4. In furtherance of the scheme to defraud, Defendar WILES in late October of 1987, discussed the inventor shortfall with Goodman and later made a presentation t security analysts and portfolio managers at the America Electronics Association regarding MiniScribe's reported an projected profit and income which were overstated as result of the inventory shortfall.

5. In furtherance of the scheme to defraud, Defenda WILES met with Taranta, Lorea and Huff in mid-Noven ber of 1987 and discussed the inventory shortfall.

6. In furtherance of the scheme to defraud, in Decemb of 1987, Defendant WILES, discussed MiniScribe's inve tory shortfall with Taranta and Lorea.

7. In furtherance of the scheme to defraud, betwe mid-October of 1987 and October of 1988, the MiniScri employees charged by Defendant WILES with conceali the inventory shortfall undertook certain illicit efforts

concealment, to wit: they created fictitious inventory in transit, transferred millions of dollars of nonexistent inventory between and among MiniScribe's various manufacturing facilities, packaged bricks, obsolete parts and scrap to look like finished goods, which was then counted as inventory; and made accounting adjustments for the inventory shortfall.

8. In furtherance of the scheme to defraud, Defendant WILES advised H&Q in early 1988 that MiniScribe had passed its audit for the 1987 fiscal year and that MiniScribe had an inventory shortfall.

9. In furtherance of the scheme to defraud, Defendant WILES on February 11, 1988, caused MiniScribe to issue a false and misleading press release to the investing public, which included the alleged amount of MiniScribe's inventory and which quoted WILES as having stated that MiniScribe had achieved the best financial results in the company's history.

10. In furtherance of the scheme to defraud, on or about February 23, 1988, Defendant WILES appointed Lorea to become Chief Financial Officer, Corporate Secretary and Treasurer.

11. In furtherance of the scheme to defraud, on or about March 30, 1988, Defendant WILES, together with Goodman and Lorea, signed and caused to be filed the Form 10-K Report with the SEC, which report contained materially false and misleading financial statements and omissions regarding MiniScribe's inflated inventory, income before taxes and net income, all resulting from the inventory shortfall and the illicit efforts to conceal it.

12. In furtherance of the scheme to defraud, in the spring of 1988, Defendant WILES caused MiniScribe to prepare and mail an annual report on fiscal year 1987 to MiniScribe's shareholders. The annual report contained

false and misleading financial statements and omissions regarding MiniScribe's inflated inventory, income before taxes and net income, all resulting from the inventory shortfall and illicit efforts to conceal it. Shareholders who received and relied upon the report include, but are not limited to, the following:

Name and Address	No. of Shares
1. David B. Frost Englewood, Colorado	5000
2. Diane and Charles Carrick Englewood, Colorado	300
3. Pauline and Harold Kay Denver, Colorado	500
4. Marcelyn and Kenneth Wahl Arvada, Colorado	300
5. Richard B. Tallian Denver, Colorado	159
6. Alvera and Fred Campbell Sterling, Colorado	50
7. Michael S. Barish Cherry Hills Village, Colorado	45,000

13. In furtherance of the scheme to defraud, Defendant WILES caused Lorea to sign and file Form 10-Q Reports on May 10, August 11 and November 15, 1988, with the SEC, which reports contained materially false and misleading financial statements and omissions regarding MiniScribe's inflated inventory, income before taxes and net income, all resulting from the inventory shortfall and the illicit efforts to conceal it.

14. In furtherance of the scheme to defraud, between April 25, 1988 and May 17, 1988, Defendant WILES sold 150,000 shares of MiniScribe stock for approximately $1,711,250 while in possession of material non-public information concerning the inventory shortfall and its conceal-

ment, and caused interstate wire communications to be used to effect the trades.

15. In furtherance of the scheme to defraud, Defendant WILES on July 13, 1988, caused MiniScribe to issue a false and misleading press release to the investing public, which included the alleged amount of MiniScribe's inventory and which quoted WILES as having stated that MiniScribe for the first half of fiscal year 1988 had achieved the best financial results in its history and noted: "Our people turned in a great performance."

16. In furtherance of the scheme to defraud, from February, 1988, to early 1989, Defendant WILES caused Standard Chartered to rely on MiniScribe's false and misleading Form 10-K Report for fiscal year 1987, the false and misleading Form 10-Q Reports for 1988, false and misleading press releases, and his own false and misleading representations and omissions regarding MiniScribe's financial condition, and as a result of said reliance Standard Chartered loaned MiniScribe approximately $70,000.000 with the understanding that approximately $30,000,000 would be used to pay off MiniScribe's Bank of America loan.

17. In furtherance of the scheme to defraud, on September 6, 1988, Standard Chartered filed UCC Form 1 with the Colorado Secretary of State's Office in order to secure its interest in MiniScribe's inventory, which inventory was part of the collateral for the $70,000,000 loan.

18. In furtherance of the scheme to defraud, in or about April of 1989, Defendant WILES, knowing that the inventory shortfall was the subject of an internal investigation, telephonically advised Goodman to tell Lorea to falsely state that they had not done anything wrong.

19. Defendant WILES since October of 1987 has continuously concealed and misrepresented the purposes of and the acts done in furtherance of this scheme to defraud.

COUNT ONE

The Grand Jury further charges that:

1. Paragraphs 1 to 11 of the Introduction are realleged and incorporated herein as though fully set forth.

2. Paragraphs 1 to 19 of the Scheme are realleged and incorporated herein as though fully set forth.

3. On or about April 1, 1988, in the State and District of Colorado and elsewhere, Defendant WILES, in a matter within the jurisdiction of the SEC (an independent agency of the United States of America), did knowingly and willfully make and cause to be made false, fictitious and fraudulent statements and a false writing and document, that is, MiniScribe's Form 10-K Report for fiscal year 1987, submitted to the SEC, stated on pages 22 and 23 that the company's inventory was $85,172,000, that its income before taxes was $33,201,000 and that its net income was $31,147,000, when in fact those figures were substantially lower; and Defendant WILES did aid, abet, counsel and induce such acts;

All in violation of Title 18, United States Code, Sections 1001 and 2.

COUNT TWO

The Grand Jury further charges that:

1. Paragraphs 1 to 11 of the Introduction are realleged and incorporated herein.

2. Paragraphs 1 to 19 of the Scheme are realleged and incorporated herein.

3. From in or about August of 1987 to in or about February of 1989, in the State and District of Colorado and elsewhere, Defendant WILES, having possession of material non-public information concerning MiniScribe's inflated inventory, income before taxes and net income, all resulting from the inventory shortfall and illicit efforts to conceal it, directly and indirectly, by the use of the means and instrumentalities of interstate commerce and of the mails, willfully did: (1) employ a device, scheme and artifice to defraud; (2) make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (3) engage in acts, practices and courses of business which operated as a fraud and deceit upon MiniScribe shareholders and unwitting purchasers and sellers of MiniScribe stock in connection with their purchases and sales of said security; and Defendant WILES did aid, abet, counsel, induce and willfully cause such acts;

All in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), 17 C.F.R. S 240.10b-5 and Title 18, United States Code, Section 2.

COUNT THREE

The Grand Jury further charges that:

1. Paragraphs 1 to 12 of the Introduction are realleged and incorporated herein as though fully set forth.

2. Paragraphs 1 to 19 of the Scheme are realleged and incorporated herein as though fully set forth.

3. From in or about February of 1988, to in or about February of 1989, in the State and District of Colorado and elsewhere, Defendant WILES for the purpose of executing a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, repre-

sentations and promises, and in attempting to do so, knowingly and willfully transmitted and caused to be transmitted by wire communications in interstate commerce certain signs, signals, and sounds, that is, wire transfers of approximately $70,800,000 from Standard Chartered's Chicago, Illinois office for the benefit of MiniScribe, of which approximately $39,927,780 was transferred to MiniScribe's account at the Colorado National Bank, Denver, Colorado; and Defendant WILES did aid, abet, counsel, induce and willfully cause such acts;

All in violation of Title 18, United States Code, Sections 1343 and 2.

A TRUE BILL:

_____

FOREPERSON

MICHAEL J. NORTON
United States Attorney

By: GERALD J. RAFFERTY
Assistant U.S. Attorney

APPENDIX D: Jury Instructions

A. Unanimity Instructions

1. Count 1:

Now, Count 1 of the indictment, charging the defendant with the knowing and willful making of a false, fictitious or fraudulent statements, alleges a number of false or fraudulent statements within the Form 10-K for fiscal year 1987.

The government is not required to prove that all the statements that are alleged in Count 1 of the indictment as false are, in fact, false. Each juror must agree with each of the other jurors, however, that the same statement or representation alleged in Count 1 to be false, fictitious or fraudulent, is, in fact, false, fictitious or fraudulent.

The jury need not unanimously agree on each such statement alleged, but in order to convict, must unanimously agree upon at least one such statement as false, fictitious or fraudulent when knowingly made or used by the defendant. Unless the government has proven the same false or fraudulent statement to each of you beyond a reasonable doubt, you must acquit the defendant of the charge in Count 1 of the indictment.

2. Count 2:

Count 2 of the indictment charges the Defendant Wiles with a violation of federal law concerning securities fraud. The indictment alleges a number of separate means or methods by which the defendant is accused of violating this law.

The government is not required to prove all of the means or methods alleged in Count 2 of the indictment, but each juror must agree with each of the other jurors, however, that the same means or method alleged in Count 2 was, in fact, engaged in or employed by the defendant in committing the

crime charged in Count 2 of the indictment. The jury need not unanimously agree on each means or method, but, in order to convict, must unanimously agree upon at least one such means or method as one engaged in by the defendant. Unless the government has proven the same means or method to each of you, beyond a reasonable doubt, you must acquit the defendant of the crime charged in Count 2 of the indictment.

As I said, with respect to these various means or methods that are charged in Count 2, while the jury doesn't have to find all of them have been proven, the jury must find that at least one, and the same one, has been proven beyond a reasonable doubt; otherwise, you must acquit the defendant of the crime charged in the count.

3. Count 3:

Count 3 of the indictment, charging the defendant with a violation of the wire fraud statute, alleges a number of separate acts to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations, or promises.

The government is not required to prove all of the acts to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises that are alleged in Count 3 of the indictment. Each of the jurors must agree with each of the other jurors, however, that the same act to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations, or promises alleged in Count 3 was, in fact, employed by the defendant.

The jury need not unanimously agree on each act, but in order to convict, must unanimously agree upon at least one such act as a scheme or a plan that was knowingly used by the defendant. Unless the government has proven the same act to defraud, or to obtain money or property by means of

false or fraudulent pretenses, representations, or promises to each of you, beyond a reasonable a [sic] doubt, you must acquit the defendant of the wire fraud charged in Count 3 of the indictment.

4. District Court's Response To Question From Jury:

(9:01 a.m. - Jury present.)

THE COURT: Members of the jury, good morning.

In response to the question that you submitted yesterday afternoon, which reads, "Can you clarify the portion of your instruction to jury regarding the requirement that we agree unanimously on one of many individual charges in each count of the indictment," I'll tell you this. In Count 1, the government alleged that the Form 10-K report for the fiscal year 1987 was false in the statement of the company's inventory as $85,172,000.00, that its income before taxes was $33,201,000.00, and that its net income was $31,147,000.00. These are three statements alleged to be false.

The government is not required to prove all three of them. It is sufficient for one element of the offense charged in Count 1 for the government to prove beyond a reasonable doubt that at least one such statement was false, fictitious or fraudulent, and the jury must unanimously agree on which statement has been proven to be false.

In Count 2, the government alleged that in connection with the purchases and sales of MiniScribe stock, the defendant, Q.T. Wiles, with knowledge concerning Miniscribe's inflated inventory, income before taxes and net income, all resulting from illicit efforts to conceal an inventory shortfall, one, employed a device, scheme or artifice to defraud. This refers to the scheme to conceal an inventory shortage. Or, two, made untrue statements of material facts or made material omissions of fact causing statements made to be misleading. This refers to false statements in the

annual reports. Or, three, engaged in a fraud and deceit upon MiniScribe shareholders and unwitting purchasers and sellers of the stock. This refers to insider trading, that is, using insider information on the sale of his stock.

The government need not prove all three of these means or methods of committing the crime of securities fraud. It is necessary, however, before there can be a conviction on this count, that the jury must unanimously agree that at least one of these means or methods has been proven beyond a reasonable doubt, and all jurors must agree on the same means or method.

Count 3 is an allegation that the defendant defrauded Standard Chartered Bank by the scheme described in he [sic] indictment, using the false statements alleged in Count 1, and that money was transferred by wire in furtherance of that scheme.

So just as with Count 1, while not all of the false statements alleged there must be proved, the jury must be satisfied beyond a reasonable doubt that at least one false statement was made, and you must all agree on the same one.

Now, this response to your question must be considered in the context of all of the instructions given to you, including the instruction that the defendant's conduct must be knowing and willful. As I said in the instructions, you're not to single out one instruction alone as stating the law. You must consider the instructions as a whole.

B. Instructions on Materiality of Statements

1. Count 1:

To sustain its burden of proof for the crime of knowingly and willfully making a false statement to the United States government, as charged in Count 1 of the indictment, the government must prove the following four essential elements beyond a reasonable doubt:

One, that Defendant Wiles knowingly made a false, fictitious or fraudulent statement or representation to the government as detailed in the indictment. Two, that in making the false, fictitious or fraudulent statement, the defendant acted willfully. Three, that the statement was made in a matter within the jurisdiction of any department or agency of the United States; and, four, the statement made was material.

Now, the Court will decide Element 3, concerning the jurisdiction of the United States, and Element 4, regarding materiality. You are to decide Element 1, whether defendant knowingly made a false, fictitious or fraudulent statement or representation; and Element 2, whether in making such a statement, the defendant acted willfully.

2. Count 2:

If you should decide that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a material fact, or a material omission under the evidence received in this case.

In order for you to find a material fact or a material omission, the government must prove beyond a reasonable doubt that the fact misstated or the fact omitted was of such importance that it could reasonably be expected to cause or to induce a person to invest, or to cause or to induce a person not to invest.

3. Count 3:

> The government must prove beyond a reasonable doubt, however, that the use of the wire communication in interstate commerce furthered or advanced or carried out in some way the scheme or plan to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations, or promises.

The phrase, "any scheme or artifice to defraud," or, "any scheme artifice for obtaining money or property," means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another, or by which someone intends to deprive another of something of value.

The term, "false or fraudulent pretenses, representations, or promises" means a statement or an assertion which contains a material or important fact, or a material or important aspect of the matter in question, and that was either known to be untrue at the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the intent to defraud.

A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

The term, "false or fraudulent pretenses, representations, or promises" includes actual direct false statements, as well as half-truths, and includes the knowing concealment of facts that are material or important to the matter in question that were made or used with the intent to defraud.

4. District Court's Response to Question From Jury:

Count 3 is an allegation that the defendant defrauded Standard Chartered Bank by the scheme described in he [sic] indictment, using the false statements alleged in Count 1, and that money was transferred by wire in furtherance of that scheme.

So just as with Count 1, while not all of the false statements alleged there must be proved, the jury must be satisfied beyond a reasonable doubt that at least one false statement was made, and you must all agree on that same one.

APPENDIX E

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78ff. Penalties

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000 or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $2,500,000 may be imposed; but no

person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

17 C.F.R. § 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Supreme Court, U.S.
FILED
JUL 21 1997
CLERK

Nos. 96-1839 and 96-8626

In the Supreme Court of the United States

OCTOBER TERM, 1996

QUENTIN T. WILES, PETITIONER

v.

UNITED STATES OF AMERICA

PATRICK J. SCHLEIBAUM, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
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QUESTIONS PRESENTED

1. Whether the securities fraud count of the indictments was duplicitous.

2. Whether the district court's unanimity instruction on the securities fraud count was adequate.

3. Whether the district court's failure to submit the issue of materiality to the jury on the false statements count tainted petitioner Wiles' conviction on the wire fraud count.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1839

QUENTIN T. WILES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-8626

PATRICK J. SCHLEIBAUM, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A64)[1] is reported at 102 F.3d 1043.

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[1] "Pet. App." refers to the appendix filed in No. 96-1839.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1996. A petition for rehearing in No. 96-1839 was granted in part and denied in part on February 14, 1997. Pet. App. B1-B8. The petition for a writ of certiorari in that case was filed on May 12, 1997. The cross-petition for a writ of certiorari in No. 96-8626, which followed the government's petition for a writ of certiorari in No. 96-1430, was filed on April 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of Colorado returned an indictment charging Patrick J. Schleibaum with making false statements to the government, in violation of 18 U.S.C. 1001 (Count 1); and securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff(a) (Count 2). In a separate three-count indictment, Quentin T. Wiles was charged with making false statements, in violation of 18 U.S.C. 1001 (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff(a) (Count 2); and wire fraud, in violation of 18 U.S.C. 1343 (Count 3). Following a jury trial in June 1994, Schleibaum was convicted on both counts against him, sentenced to 24 months' imprisonment, and fined $6,000. Following a separate jury trial in July 1994, Wiles was convicted on all three counts against him, sentenced to 36 months' imprisonment, and fined $60,000. A divided court of appeals, sitting en banc, reversed petitioners' false statement convictions on Count 1 of each indictment, but affirmed the

remainder of their convictions. Pet. App. A1-A64.[2] On March 10, 1997, the government petitioned for a writ of certiorari, seeking review of the court of appeals' reversal of Schleibaum's false statement conviction. *United States* v. *Schleibaum*, No. 96-1430.[3]

1. Petitioner Wiles was the former chairman of the board and chief executive officer of Miniscribe, a manufacturer of computer disk drives; cross-petitioner Schleibaum was Miniscribe's chief financial officer and, later, vice-president. In January, Schleibaum and other Miniscribe executives discov-

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[2] Wiles' appeal was consolidated with that of Schleibaum. Following argument, but before the release of the panel's opinion, a majority of the court's active judges voted to rehear Part II.A of the opinion en banc.

[3] The question presented in the government's petition in No. 96-1430 is whether Schleibaum was entitled to a reversal of his conviction on Count 1 under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), on the ground that the trial court, without objection, resolved the issue of materiality itself rather than submitting it to the jury. (Because of petitioner Wiles' advanced age, the government did not file a similar petition for certiorari in his case.) We asked this Court to hold the petition in No. 96-1430 pending the Court's decision in *Johnson* v. *United States*, No. 96-203, and then to dispose of it accordingly. On May 12, 1997, this Court decided *Johnson* and held that, contrary to the court of appeals' holding in this case, *Gaudin*-type errors to which no objection was made at trial are amenable to review under the plain-error standard of Federal Rule of Criminal Procedure 52(b). 117 S. Ct. 1544. Because, to the extent that it reversed petitioners' convictions on Count 1, the court of appeals' decision is inconsistent with *Johnson*, this Court should grant the government's petition for certiorari in No. 96-1430, vacate the court of appeals' decision with respect to respondent (and cross-petitioner) Schleibaum, and remand for further proceedings in light of *Johnson*.

ered that the company had an "inventory hole": a discrepancy between the actual dollar value of the inventory and the value recorded on Miniscribe's books. In October 1987, Miniscribe's management advised Wiles of the inventory hole. Because the inventory hole revealed that Miniscribe had been less profitable than widely believed, petitioners and others sought to conceal it by falsely inflating the inventory count and hiding the false count from Miniscribe's auditors. As a result, Miniscribe reported false profits in quarterly and annual earnings statements filed with the Securities and Exchange Commission (SEC). Miniscribe also disseminated false information to the public through its annual reports and quarterly financial statements. Relying on those false financial reports, Standard Chartered Bank of London extended Miniscribe $90 million in credit; the bank lost $30 million of that amount as a result of petitioners' cover-up of the inventory hole. Pet. App. A2-A14.

Petitioners were charged in separate indictments with making false statements (Count 1) and securities fraud (Count 2); Wiles alone was charged in an additional count with wire fraud (Count 3). An introductory section of each indictment, under the heading "The Scheme," contained a description of petitioners' scheme to defraud. The first paragraph of Wiles' indictment stated that, from August 1987 to March 1989, he and others engaged in an unlawful scheme to defraud, perpetrated "through materially false and misleading financial statements, misrepresentations and omissions regarding Miniscribe's inflated inventory, inflated income before taxes and inflated net income, which financial statements were reported and disseminated to the SEC, to Miniscribe shareholders, to unwitting purchasers and sellers of Miniscribe

stock and to Standard Chartered." Pet. App. C3-C4. Paragraphs 2-19 of the Wiles indictment set forth the actions that he committed in furtherance of that scheme. Those actions included filing with the SEC an annual "10-K" report for the year 1987 containing false statements about Miniscribe's inflated inventory, income before taxes, and net income (*id.* at C5 (¶ 11)); filing with Miniscribe's shareholders an annual report for the year 1987 containing the same false statements (*id.* at C5-C6 (¶ 12)); filing quarterly "10-Q" reports with the SEC on May 10, August 11, and November 15, 1988, about the inflated inventory, income before taxes, and net income (*id.* at C6 (¶ 13)); insider trading in connection with the sale of 150,000 shares of Miniscribe stock during the period April 25 to May 17, 1988 (*id.* at C6-C7 (¶ 14)); and causing Standard Chartered to lend Miniscribe approximately $70 million in reliance on, among other things, Miniscribe's false 10-K report for the year 1987 and its false 10-Q quarterly reports for the year 1988 (*id.* at C7 (¶ 16)). The 19-paragraph description of the scheme to defraud was realleged and incorporated in each count of both indictments. *Id.* at C8-C9.

The indictment against Schleibaum was similar to the Wiles indictment, but it charged a slightly broader scheme, running from January 1987 until August 1989. Schleibaum Indictment 4 (¶ 1). It also charged two different and discrete instances of insider trading: 19,998 shares in August 1987 (*id.* at 5 (¶ 5)) and multiple sales between August 1, 1988, and January 26, 1989 (*id.* at 8 (¶ 14)).

The false statement count (Count 1) of each indictment was based on petitioners' role in filing a false annual 10-K report with the SEC for fiscal year 1987. It alleged that the report falsely stated that Mini-

scribe's inventory was $85,172,000, its income before taxes $33,201,000, and its net income $31,147,000, even though, as petitioners knew, those figures should have been substantially lower. Pet. App. C8. The wire fraud count of Wiles' indictment (Count 3) was based on Standard Chartered's loan to Miniscribe in reliance on the same misrepresentations concerning Miniscribe's financial condition. *Id.* at C9-C10.

The securities fraud count (Count 2) of petitioner Wiles' indictment charged, in relevant part, that:

> From in or about August of 1987 to in or about February of 1989, in the State and District of Colorado and elsewhere, [Wiles], having possession of material non-public information concerning MiniScribe's inflated inventory, income before taxes and net income, all resulting from the inventory shortfall and illicit efforts to conceal it, directly and indirectly, by the use of the means and instrumentalities of interstate commerce and of the mails, willfully did: (1) employ a device, scheme and artifice to defraud; (2) make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (3) engage in acts, practices and courses of business which operated as a fraud and deceit upon MiniScribe shareholders and unwitting purchasers and sellers of MiniScribe stock in connection with their purchases and sales of said security.

Pet. App. C9. Count 2 of the indictment against cross-petitioner Schleibaum contained virtually identical language. See Schleibaum Indictment 10 (¶ 3). Each of the three enumerated forms of misconduct

stated a distinct "means or method" of committing securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), which forbids the use of "any manipulative or deceptive device or contrivance" in violation of rules promulgated by the SEC. See generally SEC Rule 10b-5 (codified at 17 C.F.R. 240.10b-5)).

2. At petitioners' trials, in accordance with then-existing Tenth Circuit precedent, the district court ruled that, for purposes of Count 1 (the false statement count), materiality was a question for the court, rather than the jury, to decide. Petitioners did not object to that method of deciding the materiality element. The court then determined, over petitioners' objection, that the government had met its burden on that element by producing evidence of the false statements' materiality. Pet. App. A17-A18. In instructing on the elements of the securities fraud count (both trials) and the wire fraud count (Wiles' trial), however, the court defined materiality and charged the jury that, to convict on those counts, it had to find that the misrepresentations or omissions at issue were material. *Id.* at D5-D6.[4] Defense coun-

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[4] As to Count 2, the securities fraud count, the court instructed:

> If you should decide that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a material fact, or a material omission under the evidence received in this case.
>
> In order for you to find a material fact or a material omission, the government must prove beyond a reasonable doubt that the fact misstated or the fact omitted was of such importance that it could reasonably be expected to

sel expressed satisfaction with those instructions. 7/28/94 Tr. 49 (C.A. App. 3389) (Wiles); 6/16/94 Tr. 37 (C.A. App. 357) (Schleibaum). Finally, the court instructed each jury that, to convict on Count 2, it also needed to reach unanimous agreement that the rele-

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cause or to induce a person to invest, or to cause or to induce a person not to invest.

The securities fraud statute under which Count 2 of the indictment is brought is concerned only with such material misstatements, or such material omissions, and does not cover minor, or meaningless, or unimportant ones.

7/28/94 Tr. 19 (C.A. App. 3359); see Pet. App. D5. ("7/28/94 Tr." refers to the transcript of Wiles' trial; except where otherwise noted, the relevant instructions given at Schleibaum's trial were the same as or similar to those given at Wiles' trial.)

As to the wire fraud count (Count 3) against Wiles, the court instructed:

The term, "false or fraudulent pretenses, representations, or promises" means a statement or an assertion which contains a material or important fact, or a material or important aspect of the matter in question, and that was either known to be untrue at the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the intent to defraud.

A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

The term, "false or fraudulent pretenses, representations, or promises" includes actual direct false statements, as well as half-truths, and includes the knowing concealment of facts that are material or important to the matter in question that were made or used with the intent to defraud.

Pet. App. D6; 7/28/94 Tr. 24-25 (C.A. App. 3364-3365).

vant defendant had engaged in a particular means or method set forth in that count, even though it did not need to find that he had engaged in all three of those means or methods.[5]

After the jury in the Wiles trial had retired to deliberate, it submitted the following note to the court: "Can you clarify the portion of your instruction to jury regarding the requirement that we agree unanimously on one of many individual charges in each count of the indictment." 7/29/94 Tr. 3 (C.A. App. 3393). In response to that query, the district court, without objection, see 7/29/94 Tr. 3-5 (C.A. App. 3393-3395), instructed:

> In Count 1, the government alleged that the Form 10K report for the fiscal year 1987 was false in the statement of the company's inventory as

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[5] At each trial, the court instructed:

> Count 2 of the indictment charges [defendant] with a violation of federal law concerning securities fraud. The indictment alleged a number of separate means or methods by which the defendant is accused of violating this law.
>
> The government is not required to prove all of the means or methods alleged in Count 2 of the indictment, but each juror must agree with each of the other jurors, however, that the same means or method alleged in Count 2 was, in fact, engaged in or employed by the defendant in committing the crime charged in Count 2 of the indictment. The jury need not unanimously agree on each means or method, but, in order to convict, must unanimously agree upon at least one such means or method as one engaged in by the defendant. Unless the government has proven the same means or method to each of you, beyond a reasonable doubt, you must acquit the defendant of the crime charged in Count 2 of the indictment.

Pet. App. A35 n.14.

$85,172,000.00, that its income before taxes was $33,201,000.00, and that its net income was $31,147,000.00. These are three statements alleged to be false.

The government is not required to prove all three of them. It is sufficient for one element of the offense charged in Count 1 for the government to prove beyond a reasonable doubt that at least one such statement was false, fictitious or fraudulent, and the jury must unanimously agree on which statement has been proven to be false.

In Count 2, the government alleged that in connection with the purchases and sales of MiniScribe stock, the defendant, Q. T. Wiles, with knowledge concerning MiniScribe's inflated inventory, income before taxes and net income, all resulting from illicit efforts to conceal an inventory shortfall, one, employed a device, scheme or artifice to defraud. This refers to the scheme to conceal an inventory shortage. Or, two, made untrue statements of material facts or made material omissions of fact causing statements made to be misleading. This refers to false statements in the annual reports. Or, three, engaged in a fraud and deceit upon MiniScribe shareholders and unwitting purchasers and sellers of the stock. This refers to insider trading, that is, using insider information on the sale of his stock.

The government need not prove all three of these means or methods of committing the crime of securities fraud. *It is necessary, however, before there can be a conviction on this count, that the jury must unanimously agree that at*

least one of these means or methods has been proven beyond a reasonable doubt, and all jurors must agree on the same means or method.

Count 3 is an allegation that the defendant defrauded Standard Chartered Bank by the scheme described in [the] indictment, using the false statements alleged in Count 1, and that money was transferred by wire in furtherance of that scheme.

So just as with Count 1, while not all of the false statements alleged there must be proved, the jury must be satisfied beyond a reasonable doubt that at least one false statement was made, and you must all agree on the same one.

7/29/94 Tr. 6-8 (C.A. App. 3396-3398) (emphasis added).[6]

3. After petitioners were convicted, this Court held in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), that the Fifth and Sixth Amendments require jury consideration of the materiality issue when it is

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[6] During its deliberations at Schleibaum's trial, the jury sent a note to the court, asking: "[H]ow many parts are there to Count 1 and do we have to unanimously agree on only one in order to find for guilt." The court, without objection, instructed the jury that Count 1 alleged that three statements were false on the Form 10-K report that was filed with the SEC for fiscal year 1987, that the government was required to prove that at least one of those three statements was false, and that, to convict, the jury was required to agree unanimously upon the commission of a particular false statement. The court also stated that the government was not required to prove each allegation in the scheme that was described in the opening portion of the indictment and realleged in each count, but that it was required to prove substantially the scheme alleged. 6/16/94 Tr. 40-43 (C.A. App. 360-363).

an element of a charged offense. On appeal, relying on *Gaudin*, petitioners argued that their false statements convictions under Count 1 should be reversed because, with respect to that count, the district court had decided the element of materiality without submitting it to the jury. Before the release of the panel's opinion, the court of appeals voted to rehear en banc the portion of the appeal dealing with petitioners' *Gaudin* claim.

A divided en banc court reversed petitioners' convictions on Count 1. The majority held that the type of error that occurred here—a failure to instruct the jury on an element of the offense—is a "structural" defect that is not amenable to either harmless- or plain-error analysis under Federal Rule of Criminal Procedure 52, but is instead reversible *per se*. See Pet. App. A18-A33. The court noted, however, that the district court's failure to instruct on materiality on Count 1 had no bearing on the instructions on the remaining counts and therefore did not, as petitioner Wiles had claimed, taint his conviction on Count 3. *Id.* at A29 n.11; see also *id.* at A15 n.5 (rejecting, on plain-error review, Wiles' claim that instructions on Count 3 were "equivocal").

The court affirmed petitioners' convictions on the securities fraud count of their respective indictments, rejecting their contention that the count was duplicitous. Pet. App. A33-A37. That count, the court held, charged petitioners with engaging in several means and methods of conducting an ongoing scheme to defraud. "We draw a distinction between an indictment that charges multiple offenses for distinct and separate criminal acts in the same count, and an indictment that charges multiple means of carrying out one offense associated with a continuing course

of criminal conduct." *Id.* at A35. The court noted, moreover, that the district court, due to the complexity of the scheme and the concern over nonunanimous verdicts, had in fact given the jury a specific unanimity instruction. The court found that such an instruction "suffice[d] to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *Id.* at A35-A36.

4. Petitioner Wiles petitioned for rehearing, arguing that the court had "overlooked and misconstrued" certain issues. He claimed, *inter alia*, that the court had erred in (1) overlooking his claim that the government had failed to establish the materiality of the statements alleged in the false statement count; (2) holding that the instructions given on the securities fraud count did not violate his right to a unanimous verdict; and (3) holding that the district court's failure to instruct the jury as to materiality on the false statements count did not taint the materiality instruction on the wire fraud count.

The court granted rehearing only as to the first of those claims. Pet. App. B1-B8. The court agreed that, under Tenth Circuit precedent, the prohibition against double jeopardy required it to address a claim of evidentiary insufficiency on a count that has been reversed on appeal because of procedural error at trial. *Id.* at B6. On the merits, however, the court rejected Wiles' claim that the evidence was insufficient to support the element of materiality as to Count 1. Indeed, the court determined that "Miniscribe's false 1987 10-K Report was capable of influencing, and did in fact influence, the SEC to take remedial action against Defendant." *Id.* at B7.

ARGUMENT

1. Cross-petitioner Schleibaum contends (see Pet. 2-5; see also Wiles Pet. 7 n.2) that Count 2 is duplicitous in that it charges multiple offenses in a single count. That claim is without merit.

An indictment is duplicitous if it charges two or more wholly distinct crimes in a single count. *United States* v. *Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992); *United States* v. *Dashney*, 937 F.2d 532, 540 n.7 (10th Cir.), cert. denied, 502 U.S. 951 (1991); *United States* v. *Berardi*, 675 F.2d 894, 897 (7th Cir. 1982). The traditionally expressed dangers of duplicitous counts include the possibility that the defendant may lack adequate notification of the charges against him; that he may be prejudiced in a subsequent double jeopardy defense; that the jury may convict him without unanimously agreeing on the commission of a particular offense; and that he may be prejudiced by evidentiary rulings at trial. See, *e.g.*, *United States* v. *Sasser*, 971 F.2d 470, 477 n.5 (10th Cir. 1992); *Aracri*, 968 F.2d at 1518; *Berardi*, 675 F.2d at 899; *United States* v. *UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977).

An indictment is not duplicitous, however, if the count charges the commission of a single offense or scheme by a variety of different means. See, *e.g.*, *Aracri*, 968 F.2d at 1518; *Berardi*, 675 F.2d at 898; *United States* v. *Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978). As Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides, "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." That rule "necessarily contemplates that

two or more acts, each one of which would constitute an offense standing alone, may be joined in a single count without offending the rule against duplicity." *Berardi*, 675 F.2d at 898; accord *Pavloski*, 574 F.2d at 936.

The courts of appeals have generally rejected duplicity challenges to counts of an indictment that charge several criminal acts that are part of a single unlawful scheme, even if those acts could have been separately charged in different counts.[7] In particular, "[a]s long as the essence of the alleged crime is carrying out a single scheme to defraud, then aggregation is permissible." *United States* v. *Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 1082 (1990); see also 1 L. Sand, et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-17 (1997) ("[W]here the crime charged involves a scheme to defraud perpetrated by the use of false statements, the jury need not agree with respect to which statements were false, provided there is unanimity concerning the existence of the fraudulent scheme."). Here, the se-

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[7] See, *e.g.*, *United States* v. *Bruce*, 89 F.3d 886, 889-890 (D.C. Cir. 1996); *United States* v. *Pless*, 79 F.3d 1217, 1220 (D.C. Cir.), cert. denied, 117 S. Ct. 251 (1996); *United States* v. *Jaynes*, 75 F.3d 1493, 1502 (10th Cir. 1996); *United States* v. *Pollen*, 978 F.2d 78, 84 (3d Cir. 1992), cert. denied, 508 U.S. 906 (1993); *United States* v. *Hammen*, 977 F.2d 379, 383 (7th Cir. 1992); *United States* v. *White*, 879 F.2d 1509, 1512 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990); *United States* v. *Shorter*, 809 F.2d 54, 56 (D.C. Cir.), cert. denied, 484 US. 817 (1987); *United States* v. *Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 1082 (1990); *Berardi*, 675 F.2d at 898; *United States* v. *Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983); cf. *United States* v. *Prescott*, 42 F.3d 1165 (8th Cir. 1994) (cited in Schleibaum Pet. 5) (rejecting duplicity claim on waiver grounds).

curities fraud count of the indictment—Count 2—alleged that petitioners engaged in an ongoing scheme to commit securities fraud from 1987 to 1989. Because the specific criminal acts alleged in Count 2 constituted different means or methods by which petitioners executed that scheme, that count was not duplicitous. In any event, even if it had been improper to charge those means or methods in a single count, any error in submitting that count to the jury would have been cured by the district court's specific unanimity instruction, see pp. 8-9 & n.5, *supra*, which explained that, to convict, the jury had to agree unanimously that the defendant had engaged in a particular means or method. See generally *United States* v. *Bruce*, 89 F.3d 886, 890 (D.C. Cir. 1996).

2. Petitioner Wiles separately contends, however, that those jury instructions were insufficient to ensure his right to a unanimous verdict on Count 2. See Wiles Pet. 11-24.[8] In making that argument,

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[8] Only petitioner Wiles clearly presents an independent claim that his conviction should be reversed because the jury failed to return a unanimous verdict. See Wiles Pet. i (questions presented); see also *id.* at 7 n.2. Cross-petitioner Schleibaum does not raise that claim either in his question presented (see Pet. ii) or in his reasons for granting the petition (see *id.* at 5). Instead, he suggests, in passing and in his statement of the case, only that "[t]he unanimity instruction given to the jury did not cure the duplicity problem" that he alleges. *Id.* at 4. See Pet. App. A35 & n.14. Moreover, even if Schleibaum had properly presented a distinct unanimity claim of his own, that claim would be no more worthy of this Court's review than petitioner Wiles' claim: Like Wiles, Schleibaum failed to propose a jury instruction that would have cured any unanimity concern he might now allege, and, as discussed below, the district court would not have been required to give such an instruction in any event.

Wiles no longer appears to contend that the jury was permitted to convict him without unanimously agreeing on at least one of the three "means or methods" set forth in Count 2. As the court of appeals observed, the district court foreclosed any such claim by "instruct[ing] each jury that although individual jurors need not agree on all the means or methods by which [petitioners] committed securities fraud, they must unanimously agree upon at least one such means or method to convict [them] of securities fraud." Pet. App. A35; see *id.* at A35 n.14.

Instead, Wiles bases his unanimity claim on the contention that, even in unanimously agreeing on one of the "means or methods" set forth in Count 2, the jury may not have been unanimous as to the specific acts that constituted that means or method. See, *e.g.*, Wiles Pet. 12-16, 19-21. In his view (see, *e.g.*, Pet. 14), the second means or method (which alleges "untrue statements of material facts") could be construed to embrace "six distinct 'untrue statement[s],'" and the third means or method (which alleges "fraud and deceit" in connection with the sale of securities) could be construed to embrace what he characterizes (see *ibid.*) as two separate episodes of insider trading. As a result, Wiles concludes, the jury might have unanimously found that he engaged in the second or third "means or method" without unanimously agreeing on which false statement or which episode of insider trading justified that finding.

That conclusion—that the jury instructions did not require unanimity on the specific acts that formed the basis for the three "means and method" charged in Count 2—is subject to question. The court's supplemental instruction (see pp. 9-11, supra) clearly required unanimity as to a specific "statement"

proved to be false in Counts 1 and 3; the court also required that "all jurors must agree on the same means or method" that formed the basis of Count 2. A reasonable jury, interpreting these instructions in context, would likely have concluded that all jurors must agree on the specific acts found to constitute the violations on all three counts. In any event, Wiles' claim, even if it could be raised on the instructions in this case, does not warrant further review.

a. As an initial matter—although the government did not raise this point in the court of appeals—petitioner Wiles failed to present an adequate and contemporaneous challenge to the district court's jury instructions on the specific grounds that he now advances. Wiles did move to dismiss Count 2 as duplicitous, and, at the charge conference, he did object to the initial instruction on that count as "confusing" on the ground that it charged three separate means or methods of committing securities fraud and (what appears to be essentially the same objection) that it covered "two separate transactions": *i.e.*, insider trading and concealment of the inventory hole, which were two of the means or methods charged. See 7/27/94 Tr. 9-11 (C.A. App. 3297-3299); see also *id.* at 9 (C.A. App. 3297) (noting that "[t]his was the subject of our motion to dismiss").

Like cross-petitioner Schleibaum, however, Wiles did not squarely object to the instructions at the charge conference on the distinct ground—now the basis of his unanimity challenge—that a unanimous finding with respect to any given means or method might itself rest on non-unanimous findings with respect to specific acts. Nor does he appear to have proposed jury instructions of his own that would have

addressed that concern. Moreover, he did not object to the supplemental instructions that the district court issued in response to the jury's request during its deliberations for clarification of the unanimity requirement. See 7/29/94 Tr. 3-5 (C.A. App. 3393-3395); see also 6/16/94 Tr. 39-40 (C.A. App. 359-360) (Schleibaum trial) (defense counsel's expression of agreement with instructions given in response to jury request for clarification of unanimity requirement with respect to Count 1). In sum, Wiles gave the district court inadequate notice of the unanimity claim that he now advances, see Fed. R. Crim. P. 30, and the extent to which he has preserved that claim for this Court's review is therefore uncertain. See generally *United States* v. *Olano*, 507 U.S. 725 (1993) (describing plain-error review under Federal Rule of Criminal Procedure 52(b) for "forfeited" errors).[9]

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[9] Moreover, the court of appeals itself did not clearly address the unanimity claim that Wiles presents in his petition. Instead, that court acknowledged "the concern over nonunanimous verdicts" and held that the district court had met that concern by "tender[ing] a unanimity instruction to the respective juries as part of their instructions on count two." Pet. App. A35. The court understood Wiles to have argued that the jury "did not understand [that] unanimity instruction," and it rejected that argument on the ground that "[w]e must presume that the jurors remained loyal to their oaths and conscientiously followed the district court's instructions." *Id.* at A36-A37. The court did not, however, explicitly address the separate claim that the district court had erroneously failed to require unanimity with respect to the particular acts constituting any given means or method. For that reason alone, the court of appeals' opinion cannot be said to have created or deepened any circuit conflict that Wiles alleges on the unanimity issue.

b. In any event, petitioner Wiles would not have been entitled to a more detailed unanimity instruction even if he had proposed one. "[D]ifferent jurors may be persuaded by different pieces of evidence [of criminal wrongdoing], even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Schad* v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)); 501 U.S. at 649 (opinion of Scalia, J.) ("[I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission."). Moreover, "[w]e are convinced * * * of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution, and we think that instead of such a test our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness * * * and for the rationality that is an essential component of that fairness." *Id.* at 637 (plurality opinion).

Because that inquiry turns on the nature of the specific criminal statute at issue—here, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b)—petitioners' reliance on decisions (and circuit conflicts) involving other federal statutes (see Pet. 16-24) is unavailing.[10] Section 10(b) makes it a crime

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[10] Moreover, those decisions do not support Wiles' position even by analogy. For example, in *United States* v. *Payseno*, 782 F.2d 832 (9th Cir. 1986), and *United States* v. *Holley*, 942 F.2d 916 (5th Cir. 1991), the courts found that the indictments in question were duplicitous, and reversed the defendants' convictions, because the jury in each case had been given no

specific unanimity instruction beyond the general instruction that its verdict had to be unanimous. See also *Bins* v. *United States*, 331 F.2d 390, 393 (5th Cir.), cert. denied, 379 U.S. 880 (1964). The instructions given in this case, however, went far beyond the general unanimity instructions disapproved in those cases: the instructions specifically informed the jury that the indictment charged petitioners with committing securities fraud by three separate means or methods and that its verdict had to be unanimous as to at least one such means or method.

Wiles cites only one case in which a court reversed a conviction based on instructions even arguably similar to those given here. See Pet. 20-21. In *United States* v. *Beros*, 833 F.2d 455, 460-461 (3d Cir. 1987), the counts against the defendant alleged four separate theories of criminal activity (embezzlement, abstraction, stealing, and conversion of union funds) and enumerated several distinct acts, any one of which might have provided the basis for a guilty verdict under those theories. The district court instructed the jury that it had to agree unanimously on a particular theory of criminality, but rejected a defense request for an instruction that would have informed the jury that it must unanimously agree upon the specific transaction that it believed supported the defendant's guilt under that theory. *Id.* at 458. The court of appeals reversed on the grounds that the instruction given was insufficiently specific and that the error was not harmless beyond a reasonable doubt (because there was a "significant possibility" that it might have resulted in a non-unanimous verdict). *Id.* at 463. *Beros*, however, relied (see *id.* at 460-461) upon *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), whose "distinct conceptual grouping" analysis was later rejected by the plurality in *Schad*. See 501 U.S. at 634-637. Moreover, unlike the defendants in *Beros*, see 833 F.2d at 458 & n.3, Wiles did not propose an instruction that would have removed the unanimity concern that he now raises; as a result, his claim, if preserved at all, is more appropriately addressed under the stringent plain-error standard of Federal Rule of Criminal Procedure 52(b) than under the harmless-error analysis applied in *Beros*. Compare *id.* at 462-463. Finally, as noted, *Beros* did not involve a scheme to defraud in violation of the securities laws.

to use or employ, in connection with the purchase or sale of a security, "any manipulative or deceptive device or contrivance" in violation of the rules and regulations prescribed by the SEC. Under that authority, the SEC promulgated Rule 10b-5, which makes it unlawful for a person, in connection with such a purchase or sale, to (1) employ a device, scheme, or artifice to defraud, (2) make any false statement of material fact (or material omission), or (3) engage in any act, practice, or course of business that operates as a fraud or deceit upon any person. 17 C.F.R. 240.10b-5 (1990).

Whether or not a defendant is entitled to a jury instruction requiring unanimity with respect to any given one of those three "means or methods" of engaging in a "manipulative or deceptive device"—an instruction that both petitioners in fact received here—nothing in the statute or in Rule 10b-5 suggests that, on the facts of this case, Wiles was entitled to a further unanimity instruction more explicitly addressing the specific (and, here, closely related) acts that embody a given means or method upon which the jury did unanimously agree.[11] See pp. 8-11, *supra* (discussing instructions); 7/28/94 Tr. 5 (C.A. App. 3345) (instructing jury: "The government has alleged a common scheme with respect to all three counts, Counts 1, 2, and 3, and the government is not required to prove each allegation in the scheme.

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[11] Although Wiles cites several decisions involving the securities laws, see Pet. 12-14, those decisions do not address the unanimity issue presented here. See, *e.g.*, *United States* v. *Langford*, 946 F.2d 798, 803 (11th Cir. 1991) (addressing claim that indictment was "multiplicitous" in that it contained *too many* counts alleging the same course of criminal misconduct), cert. denied, 503 U.S. 960 (1992).

The government must prove substantially the scheme that has been alleged."). More generally, even outside the securities law context, "where the crime charged involves a scheme to defraud perpetrated by the use of false statements, the jury need not agree with respect to which statements were false, provided there is unanimity concerning the existence of the fraudulent scheme." 1 L. Sand, et al., *Modern Federal Jury Instructions* ¶ 9.07, at 9-17 (1997) (citing, *inter alia*, *United States* v. *Gruenberg*, 989 F.2d 971, 975 (8th Cir.), cert. denied, 510 U.S. 873 (1993); *United States* v. *Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); and *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976)).

c. In any event, this case would be a poor vehicle for resolving any question concerning the jury-unanimity doctrine, because, in light of the instructions that the district court did give, the jury's verdict almost certainly satisfied even the more exacting unanimity requirement that petitioner Wiles proposes. Wiles claims (Pet. 14) that the "false statements" prong of Count 2 could have encompassed six distinct (albeit closely related) false or misleading statements in six separate documents, and the "insider trading" prong of Count 2 could have encompassed insider trading "*either* in April *or* May of 1988." Accordingly, he contends (Pet. 16), the jury "could convict him of making false statements without agreeing on which false statement; similarly, [it] could convict him of engaging in insider trading without agreeing on which trades constituted insider trading."

That speculation, however, is without merit. First, despite Wiles' contrary assertion (see Wiles Pet. 12,

14), Count 2 did not allege two discrete instances of insider trading. Instead, it charged that, "[i]n furtherance of the scheme to defraud, *between April 25, 1988 and May 17, 1988*, [Wiles] sold 150,000 shares of MiniScribe stock for approximately $1,711,250 while in possession of material non-public information concerning the inventory shortfall and its concealment." Pet. App. C6-C7 (emphasis added). Thus, to base its conviction on the insider trading prong of Count 2, the jury had to agree unanimously that, between the two dates alleged, Wiles in fact sold 150,000 shares of stock for approximately $1,711,250.

Second, there was no substantial danger that, if the jury relied on the false statements prong as a basis for Wiles' conviction, it failed to reach unanimity as to a specific false statement. The jury convicted petitioners on Count 1, which charged them with making false statements on the annual 10-K report filed with the SEC for fiscal year 1987, and further convicted Wiles on Count 3, which charged "the very same false statements at issue in Count 1." Wiles Pet. 8; accord 7/29/94 Tr. 8 (C.A. App. 3398) (instructing jury that "Count 3 is an allegation that the defendant defrauded Standard Chartered Bank * * * using the false statements alleged in Count 1"). Because the filing of that same 10-K report was included as one of the misrepresentations underlying the false statements prong of the securities fraud count, see Pet. 4; Pet. App. C5 (¶ 11), C8-C9 (¶¶ 2-3), the guilty verdict on those counts indicates that the jury did in fact unanimously agree on at least one of the false statements sufficient to support a conviction on Count 2.[12]

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[12] Although the court of appeals reversed Wiles' conviction on Count 1 because the district court rather than the jury

As a result, any error in the district court's unanimity instruction on Count 2 was logically irrelevant to Wiles' conviction on that count. See generally *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment) ("When * * * other facts necessarily found by the jury[] are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed.").[13]

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found that his false statements had been material, this Court's subsequent decision in *Johnson* v. *United States*, 117 S. Ct. 1544 (1997), indicates that that conviction should have been affirmed under the plain-error standard, because, as the court of appeals itself determined, the "false 1987 10-K Report was capable of influencing, *and did in fact influence*, the SEC to take remedial action against Defendant." Pet. App. B7 (emphasis added); see *Johnson*, 117 S. Ct. at 1550. In any event, because the jury also convicted Wiles on Count 3, and because (as discussed below) the jury was in fact required to make a materiality determination with respect to Count 3, the guilty verdict on that count independently suggests the jury's unanimity with respect to a specific false statement charged in Count 2.

[13] Moreover, even if Wiles' view of the unanimity requirement were correct, it would still be unclear whether, fairly read, the district court's instructions constituted error at all. Although the indictment alleged that Wiles made six separate but related false statements, see p. 5, *supra*, the district court effectively narrowed the false statement prong of the indictment by instructing the jury—after the jury asked for clarification of the unanimity requirement—that that prong referred to "false statements in the annual reports." Pet. App. D3-D4. There were only two annual reports: the 10-K report filed with the SEC for fiscal year 1987, and the false annual report (also for fiscal year 1987) sent to the shareholders in the spring of

3. Finally, petitioner Wiles contends (Pet. 24-29) that the district court's instruction on 18 U.S.C. 1001 (Count 1), which removed the issue of materiality from the jury, infected the jury's consideration of the wire fraud charge (Count 3) by suggesting that no jury determination on the issue of materiality was required as to that offense either. As the court of appeals noted (Pet. App. A15 n.5, A29 n.11), that claim is without merit.

In its instructions on Count 3, as in its instructions on Count 2, the district court emphasized that materiality was an element of the offense and defined that element for the jury. See note 4, *supra*. The court also instructed the jury that a separate crime was charged in each count of the indictment, and it cautioned the jury to consider each count separately. See 7/28/94 Tr. 4-5 (C.A. App. 3344-3345). Under those circumstances, the jury could not have misunderstood its obligation to consider the materiality element presented in Count 3. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954, 962 (1st Cir. 1995); cf. *United States* v. *Nash*, 76 F.3d 282 (1996) (reversing conviction where erroneous materiality instruction appeared, by its terms, to refer to all counts), opinion withdrawn and superseded, Nos. 91-50760, *et al.*, 1997 WL 345977 (9th Cir. June 25, 1997) (to be reported at 115 F.3d

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1988. The annual report to the shareholders contained the same false financial information that was contained in the annual report to the SEC. See Gov't C.A. Br. 18. Thus, if the jury based its conviction of Wiles on the false statements prong of the securities fraud count, the district court's supplemental instruction made it almost certain that the jury unanimously agreed that he made the false statements common to both the SEC and the shareholder annual reports. See also pp. 17-18, *supra*.

1431) (reinstating conviction). Wiles' factbound claim to the contrary warrants no further review.[14]

CONCLUSION

The petition for a writ of certiorari in No. 96-1839 and the cross-petition for a writ of certiorari in No. 96-8626 should be denied.

Respectfully submitted.

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JULY 1997

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[14] In any event, petitioner did not object to the instruction on Count 3. As a result, even if that instruction had erroneously removed the issue of materiality from the jury, which it did not, that error, like the instructional error concerning Count 1, would not justify reversal of Wiles' conviction. See notes 3, 12, *supra*.

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No. 96-1839

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

QUENTIN T. WILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. The Unanimity Question

As stated in the petition for writ of certiorari, the Tenth Circuit added to the considerable confusion among the lower federal courts regarding the nature of the unanimity requirement in federal prosecutions, by holding that multiple offenses — each defined by statute as a separate and distinct crime — could be joined in a single count without an instruction requiring the jury to reach unanimity as to any particular offense, so long as the offenses are alleged to be part of an on-going scheme. Respondent's brief in opposition only highlights this confusion and underscores the need for clarification by this Court: Respondent concedes that the

appropriate level of unanimity is determined by the statute itself, Opposition at 20, yet persists in the inconsistent and mistaken view that separate offenses may be joined in a single count under the rubric of a "scheme," *id.* at 23, and even offers the notion that a nonunanimous verdict may stand unless it offends "fundamental fairness." *Id.* at 20. In advancing these conflicting theories to sustain the verdict, Respondent effectively concedes the desirability of granting the petition in this case, in order to resolve the issue of the nature of the unanimity required to support a verdict of guilt under Rule 10b-5. The purpose of this reply, therefore, is simply to clarify a few matters that are incorrectly set forth, or relied upon, in Respondent's brief in opposition and to show that the writ in this case should be granted.

1. **Respondent's argument that a jury need not agree unanimously on the particular acts constituting a scheme to defraud has no application to this case.**

Respondent does not dispute that *each* materially false statement in connection with a purchase or sale of a security, whether or not part of a larger scheme, constitutes a separate offense under Rule 10b-5. *See Peil v. Speiser,* 806 F.2d 1154, 1162 (3d Cir. 1986). Respondent continues to assert, however, that a conviction under Rule 10b-5 may be sustained where allegations of multiple false statements are submitted to the jury without a requirement that they all agree as to at least one such statement, so long as the statements alleged to have been made in furtherance of a fraudulent scheme. Opposition at 22-23. Respondent errs by conflating two separate sections of Rule 10b-5. Respondent's view is undoubtedly correct when a defendant is charged in a single count solely with having violated Rule 10b-5 by engaging in such a scheme: so long as the jury is required to find unanimously that a defendant engaged in a scheme to defraud, the jury need not also unanimously agree on "preliminary factual issues" support-

ing that finding. *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991).

Mr. Wiles, however, was convicted under an indictment and jury instructions that did not require a unanimous finding of a fraudulent scheme. On the contrary, the indictment and the instructions alleged three "means or methods" of violating Rule 10b-5, only one of which was a scheme to defraud in one count. The jury was instructed to find Mr. Wiles guilty if they agreed that Mr. Wiles made a false statement to shareholders or engaged in insider trading, *regardless of whether they unanimously agreed that Mr. Wiles engaged in a scheme to defraud.* The false statements and insider trading alleged in this case were thus separate offenses in themselves, and alternative bases for a conviction, rather than mere predicate facts to an offense of engaging in a fraudulent scheme. Given that several distinct offenses were subsumed under the second and third "means or methods" — i.e., use of materially false or misleading statement in connection with a sale or purchase of a security, and of engaging in insider trading — of violating Rule 10b-5, instructing the jury to agree on one means or method was insufficient to ensure that they agreed on a particular offense. As a result, the jury should have been instructed to reach a unanimous verdict with respect to at least one such statement or one such trade by Wiles or a shareholder. Respondent's argument that the jury need not agree on the factual predicates for a scheme to defraud, therefore, is entirely beside the point.

2. The unanimity question was adequately preserved and is properly before this Court.

Respondent's contention, raised for the first time here, that Petitioner did not adequately preserve the unanimity objection is simply meritless. Petitioner moved to dismiss Count 2 of the indictment on grounds that it joined multiple

offenses in a single count and was duplicitous. Court of Appeals Appendix ("C.A.App.") 37-45. Petitioner specifically alluded to the danger of a nonunanimous verdict as a basis for the motion. *See* C.A.App. at 42; *see also*, *United v. Starks*, 515 F.2d 112, 116-17 (3d Cir. 1975), (danger of less than unanimous verdict is one of the "vice[s] of duplicity"), *aff'd*, 431 U.S. 651 (1977). Moreover, at the close of evidence, Petitioner renewed his objection to Count 2 and the district court's instructions on grounds that, given the multiple offenses charged in Count 2, the jurors would be confused and may vote to convict based on different offenses. C.A.App. 3297-98. The government, however, refused to make an election among the multiple offenses charged in Count 2. Having properly and repeatedly raised this objection, Petitioner did not forfeit his objections simply because the district court later reiterated a virtually identical "means or methods" instruction in response to a question from the jury. The unanimity question, therefore, was fairly presented to the district court in a timely manner. Fed. R. Crim. P. 30. That the issue was adequately preserved in the district court was not disputed by Respondent on appeal because it could not be reasonably disputed.

Respondent's assertion that the Court of Appeals "did not clearly address the unanimity claim" and did not contribute to a confusing split of authority among the circuits, Opposition at 19, n.9, is likewise without merit. Petitioner repeatedly argued before the Court of Appeals that the instructions failed to require the jury to reach unanimity as to the distinct offenses — including the multiple offenses of making false statements and the transactions allegedly constituting "insider trading" — joined in Count 2. Pet. C.A. Brief at 34-43; Pet. C.A. Reply Brief at 18-22; Pet. C.A. Petition for Rehearing at 5-8. Respondent also addressed this precise issue before the Court of Appeals. Resp. C.A. Brief at 41-44. After the parties fully briefed the issue, the Court of Appeals held squarely, albeit erroneously, that the

jury need not be instructed to agree unanimously on at least one among the multiple offenses alleged in Count 2, because the offenses were allegedly parts of a continuing scheme. This holding is clearly in conflict with decisions of other circuits holding that unanimity as to a particular act is required where each such act is defined by the relevant statute as a separate offense. *See e.g., United States v. Starks*, 515 F.2d 112, 117-18 n. 9 (5th Cir. 1991); *United States v. Edmonds*, 80 F.3d 810, 819 (3d Cir. 1996); *see* Petition for Writ of a Certiorari at 16-24. That the Tenth Circuit's holding, if uncorrected, will spawn further confusion in the lower federal courts is demonstrated by the inconsistent positions taken by Respondent who at times endorses the Court of Appeals' scheme-based approach, Opposition at 22-23, and at other times implicitly concedes that separate offenses as defined by statute require a unanimous verdict. Opposition at 20.

3. The jury's "findings" in other counts against Mr. Wiles do not encompass a unanimous finding sufficient to sustain the conviction under Count 2.

Respondent suggests that the now-vacated guilty verdict under the false statement count (Count 1) and the guilty verdict under the wire fraud count (Count 3) necessarily imply that the jury unanimously agreed as to at least one materially false statement among the many alleged to be contained in the five financial reports and a press release. Opposition at 24-25. This contention is without merit.

Contrary to Respondent's assertion, the jury did not find *any* statement in the 1987 10-K report to be materially false. In Count 1, the jury was erroneously told that the court will determine the materiality of the three allegedly false statements in that report, and consequently the jury made no finding of materiality. Likewise, the jury was not told to determine the materiality of the same statements in

Count 3. See *infra* II. Regardless of whether the latter error is "plain," the fact remains that there has been no *jury* determination that any of the statements were materially false. Accordingly, there is no unanimous jury finding which "effectively embraces" a finding that at least one of the statements alleged in Count 2 were materially false. *See Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment).

While the Respondent asserts that the Court of Appeals "determined" that the statements at issue were material, Opposition at 13, this assertion is irrelevant and wrong. On petition for rehearing, the Court of Appeals addressed the issue of materiality only for the purpose of determining whether the government presented sufficient evidence of materiality to support such a finding by a reasonable jury if the issue had been presented to them — so that a retrial on that count would not violate the prohibition on double jeopardy. The Court of Appeals merely held that the evidence "in the light most favorable to the government" was sufficient to support such a finding. An appellate court's "determination" of sufficiency cannot substitute for an actual finding by a jury beyond a reasonable doubt that at least one of the statements was materially false. *See California v. Roy*, 117 S.Ct. 337, 339 (1996) (Scalia J., concurring in the judgment) ("appellate speculation about a hypothetical jury's action, . . ." cannot replace "an actual jury finding of guilty") (*quoting Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993)). This Court has made clear that the requirement of a jury finding cannot be satisfied by appellate speculation, no matter how overwhelming the evidence. In fact, here the evidence on materiality was not overwhelming; it was hotly disputed by petitioner. *Sullivan*, 508 U.S. at 280. Accordingly, no other finding in this case obviates the need for a unanimous finding of guilt as to Count 2.

II. The Gaudin Question

Notwithstanding Respondent's assertion to the contrary, the jury was never instructed that they had to determine that the statements alleged to be fraudulent in Count 3 were materially false. The district court defined materiality for the jury in Count 1 and told them that the court would decide; it defined materiality in Count 2 and told the jury that they must decide; and it defined materiality in Count 3 without telling them who must decide the issue. Pet. App. D5-6. The district court compounded this error by pointing out to the jury that the same statements were at issue in Count 1 and Count 3. Pet. App. D7. This removal of the element of materiality from the jury's consideration constitutes error under *United States v. Gaudin*, 115 S.Ct. 2310 (1995).

In light of this Court's decision in *Johnson v. United States*, 117 S.Ct. 1544 (1997), this error may have to be evaluated under the plain-error standard of Federal Rules of Criminal Procedure 52(b). The error was "plain" at the time of appellate consideration, which occurred after this Court's decision in *Gaudin*. *See Johnson*, 117 S.Ct. at 1549. Although the Court did not reach the issue in Johnson, a failure to instruct the jury to determine an element of the crime affects "substantial rights," Fed. R. Crim. P. 52(b), because the Fifth Amendment entitles a defendant to a jury determination of every essential element of the crime charged. *Sullivan*, 508 U.S. at 277-78. Finally, unlike *Johnson*, where materiality of the perjured statements were "essentially uncontroverted," *id.* at 1550, the question of materiality was intensely disputed in this case: Mr. Wiles disputed the government's materiality showing prior to trial, at the close of the government's case, and again in his motion for judgment N.O.V. Failure to require a jury determination on this issue under these circumstances will seriously undermine the "fairness, integrity or public reputa-

tion of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993); *see Gaudin*, 115 S.Ct. at 2314-15 (determination of materiality involves "delicate assessments of the inferences a reasonable decision maker would draw from a given set of facts and the significance of those inferences to him" and is "peculiarly on[e] for the trier of fact") (internal quotations omitted).

Although Petitioner submits that the error constitutes reversible error under the *Johnson* standard, given that the Court of Appeals has not had an opportunity to evaluate this issue under the proper standard, Petitioner respectfully submits that this Court should grant the petition, vacate the conviction on Count 3, and remand to the Tenth Circuit for reconsideration in light of the plain-error analysis outlined in *Johnson*. While the Respondent suggests that the issue of materiality was settled by the Tenth Circuit, Opposition at 13, this claim is without merit. The Tenth Circuit merely held that "[c]onstruing the evidence in a light most favorable to the government" there was sufficient evidence to support a finding of materiality, such that a retrial on the false statement count would not violate the prohibition against double jeopardy. Pet. App. B-7. The court did not determine that a reasonable jury could not have found the statements immaterial, or that the fairness and integrity of criminal process would not be undermined if the matter is not submitted to the jury. Accordingly, Mr. Wiles' conviction under Count 3 should be vacated and the case remanded to the Tenth Circuit for determination of whether the failure to instruct the jury constitutes plain-error under *Johnson*.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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